SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-340

THE PEOPLE ex rel. JOHN K. VAN DE KAMP, as District Attorney, etc., et al.,

Petitioners,

v.

PROJECTION ROOM THEATER, et al.,

Respondents.

(and 4 other cases)

PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP
District Attorney of
Los Angeles County
Member of the Bar of the
Supreme Court of the United States

Of Counsel: HARRY B. SONDHEIM
Head, Appellate Division

DIRK L. HUDSON
Deputy District Attorney

849 South Broadway, 11th Floor
Los Angeles, California 90014
Telephone: 974-5921

Attorney for Petitioner

(Remaining Counsel Listed
on Next Page)

BURT PINES, City Attorney
of City of Los Angeles

By

RICHARD M. HELGESON
Deputy City Attorney

Attorneys for Petitioner

Members of the Bar of the
Supreme Court of the
United States

1700 City Hall East
Los Angeles, California 90012
Telephone: 485-3801

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitutions

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-

THE PEOPLE ex rel. JOHN K. VAN DE KAMP, as District Attorney, etc., et al.,

Petitioners,

v.

PROJECTION ROOM THEATER, et al.,

Respondents.

(and 4 other cases)

PETITION FOR WRIT OF CERTIORARI

The petitioner, the People of the State of California,[1/] respectfully prays that a writ of certiorari issue to review that part of the judgment and opinion of the California Supreme Court entered in this proceeding on June 1, 1976, holding, at the pleading stage herein, that:

---

1. The full titles of these consolidated cases (including the names of all parties) are as follows:
(Footnote continued.)

(Footnote 1 continued)

Joseph P. Busch, District Attorney of Los Angeles County, Burt Pines, City Attorney, City of Los Angeles, Raymond J. Byrne, Deputy District Attorney, David M. Schacter, Deputy City Attorney, Petitioners, v. The Projection Room Theatre, 713 North Western Avenue, Los Angeles, California, Charlotte Reed, Natalie Robin; I.T. Corporation, Willard C. Oppenheim; Howard C. Wirick Jr., Mark Wirick, Respondents, L.A. 30432.

Joseph P. Busch, District Attorney of Los Angeles County, Burt Pines, City Attorney, City of Los Angeles, Raymond J. Byrne, Deputy District Attorney, David M. Schacter, Deputy City Attorney, Petitioners, v. Stan's Books, Sam Rabin, Morris Rosen, Pacific Southwest Realty, B & I News, Inc., Sterling J. Colby, Robert Maimer and Alfred Rodney, Respondents, L.A. 30433.

Joseph P. Busch, District Attorney of Los Angeles County, Burt Pines, City Attorney, City of Los Angeles, Raymond J. Byrne, Deputy District Attorney, David M. Schacter, Deputy City Attorney, Petitioners, v. Book Bin, etc., Joseph Ingber, Daniel J. Apple, Movie Matic Incorporated, Michael Thevis, Roger Underhill, Joan Thevis, Noel C. Bloom, Phillip Alan Fishman, Peter Lewis and Sherry Bloom, Respondents, L.A. 30434.

Joseph P. Busch, District Attorney of Los Angeles County, Burt Pines, City Attorney, City of Los Angeles, Petitioners, v. Galaxy Book Store, Ahmed Bey, Acme Conveyance Corporation, Margaret Steiner, and Richard Nathan, Respondents, L.A. 30435.

Joseph P. Busch, District Attorney of Los Angeles County, Roger Arnebergh, City Attorney, City of Los Angeles, Raymond J. Byrne, Deputy District Attorney, David M. Schacter, Deputy City Attorney, Petitioners v.
(Footnote continued)

"[E]ven after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene[,] * * * the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution." (People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42, 59; See Appendix B.)

OPINIONS BELOW

The final June 1, 1976 opinion of the California Supreme Court is so far reported only in the advance sheets at 17 Cal.3d 42

(Footnote 1 continued)
Jasons Adult Books, 1702 North Western Avenue, Hollywood, California, Kaufman Investment Corporation, Lew Kaufman, Violet Kaufman; and Stuart D. Parr, Respondents, L.A. 30436.

(see Appendix B). The original March 4, 1976 opinion of that Court is reported only in the advance sheets at 16 Cal.3d 360 (see Appendix C). The December 27, 1974 opinion of the California Court of Appeal (Second Appellate District, Division 3) is reported only in the advance sheets at 44 Cal.App.3d 111 (see Appendix D). The minute orders of the Superior Court for Los Angeles County (containing a brief statement of reasons for decision) appear as follows: C.T. 11 in the Projection Room Theater, Book Bin, and Stan's Books cases, C.T. 17 in the Galaxy Book Store case (all on June 18, 1973), and C.T. 21 in the Jason's Adult Books cases (on June 28, 1973) (see Appendix E). All of the foregoing opinions appear in the Appendices herein as indicated.

JURISDICTION

The final judgment of the California Supreme Court was entered on June 1, 1976 (see Appendix B) (replacing that previously entered March 4, 1976 [see Appendix C] after respondent's petition for rehearing was denied, June 1, 1976). Included in the June 1, 1976 opinion was a new holding denying to petitioner the remedies of closure and generic injunctions. From this holding Justices Clark and McComb dissented.

Petitioner's timely petition for reconsideration and for modification of the opinion was denied on July 15, 1976 (see Appendix F). This petition for certiorari was filed within 90 days of that date and of the date of the June 1, 1976 judgment.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).[2/]

---

2. The California Supreme Court's express holding, foreclosing in advance the forms of relief particularly prayed for, has left petitioner no choice but to seek certiorari now. Otherwise petitioner would be in the strange position of litigating in a trial court operating under a prior restraint (as to remedy), contrary to a litigant's right to have each successive issue decided according to correct principles of law. To permit this case to go to trial without this Court's review at this time would require petitioners to undertake a wasteful second appeal from a trial court judgment decided in accordance with the existing views of the highest state authority, as expressed in the opinion from which we herein seek certiorari. Nor would the question be open at the state appellate level, being precluded by the doctrines of (1) the law of the case (see People v. Shuey, 13 Cal.3d 835, 841; Gyerman v. United States Lines Co., 7 Cal.3d 488, 498) and (2) stare decisis (see People v. Triggs, 8 Cal.3d 884, 891; Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450, 455). Thus, there would appear to be no way for us to urge the preservation of the federal constitutional issue now ripe for decision without defying the California Supreme Court (see Cox Broadcasting

(Footnote continued)

(Footnote 2 continued)

Corporation v. Cohn, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029, 1039, 1041 [1975]; North Dakota State Board of Pharmacy v. Snyder's Drug Store, Inc., 414 U.S. 156, 162-163, 38 L.Ed.2d 379, 384-385, 94 S.Ct. 407, 412 [1973]; Hudson Distributors v. Eli Lilly & Co., 377 U.S. 386, 389, 12 L.Ed.2d 394, 397, 84 S.Ct. 1273, 1276 [1964], n. 4; cf. Miranda v. Arizona, 384 U.S. 436, 498, 16 L.Ed.2d 694, 737, 86 S.Ct. 1602, 1640 [1966], n. 71). A subsequent petition might well be regarded as coming too late (see Rio Grande Western Ry. v. Stringham, 239 U.S. 44, 47, 60 L.Ed. 136, 137-138, 36 S.Ct. 5, 6 [1915]). Finally, the peculiar situation of a foreclosure of particular forms of relief at the pleading stage presents the federal constitutional issue in an unusually clear fashion, unmixed with non-constitutional considerations as to the precise contours of appropriate relief resulting from findings at a later stage and of a less universal interest. Thus the issue as presently posed would appear to be "capable of repetition, yet evading review" (cf. Nebraska Press Association v. Stuart, ___U.S. ___, 44 U.S. L.W. 5149, 5151 [No. 75-817, June 30, 1976]).

QUESTIONS PRESENTED

A. Whether the California Supreme Court, in direct conflict with this Court's decision in Art Theater Guild, Inc. et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975), and in conflict in principle with other decisions of this Honorable Court, has erroneously concluded that the First and Fourteenth Amendments to the United States Constitution preclude a state from seeking in its pleadings to close for a year premises which constitute a place of lewdness by virtue of continuous exhibition or dissemination of obscene matter.

B. Whether the California Supreme Court, in conflict in principle with Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), has erroneously concluded that the First and Fourteenth Amendments to the United States Constitution preclude a state from seeking in its pleadings to perpetually enjoin the further operation as a public nuisance of premises which

constitute a place of lewdness by virtue of continuous exhibition or dissemination of obscene matter.

C. Whether the constitutionality per se of the remedies of closure and generic injunction limited to the premises as applied to "adult" motion picture theatres and book stores presents "a federal question of substance" within the meaning of Rule 19(a) of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are set forth in Appendix A.[3] They are: United States Constitution, First Amendment; United States Constitution, Fourteenth Amendment; California Penal Code section 370; California Civil Code, section 3479; California Civil Code, section 3480; California Civil Code, section 3491; California Penal Code, section 311.

---

3. California Penal Code sections 11230 and 11231 (Red Light Abatement Act) are not included in Appendix A because the California Supreme Court held these sections inapplicable to the facts herein as a matter of state law.

STATEMENT OF THE CASE[4]

In these consolidated cases, petitioners who are law enforcement officers acting on behalf of the City and County of Los Angeles, seek injunctive and other relief against respondents who, according to the five separate complaints filed herein, operate book stores or motion picture theaters in Los Angeles which continuously exhibit magazines or films that are obscene[5] under the laws of California.

The complaints herein allege the following facts: (1) respondents own or operate specified premises in Los Angeles County in which acts of "lewdness" are taking place, namely, the "past and continuing exhibition" of magazines and films "all of which are lewd and obscene under the laws of this State, and therefore did and do constitute a nuisance under the laws of this state . . ."; (2) the magazines and films so

---

4. Key to abbreviations used in the text:
AOB - Appellant's Opening Brief
ARB - Appellant's Reply Brief
R.T. - Reporter's Transcript on Appeal
C.T. - Clerk's Transcript on Appeal (referred to by LA number unless same page applies to all cases)

The "L.A." numbers refer to the designation of these cases by the California Supreme Court.

5. "Obscenity" was defined in terms of the tripartite definition in California Penal Code section 311. (See Appendix A, infra.)

exhibited have, as their dominant theme, an "appeal to the prurient interest in sex," are "patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters," and are "utterly without social value . . ."; and (3) the maintenance of these premises constitutes a public nuisance[6/] which will continue unless restrained and enjoined. Made a part of the respective complaints were numerous exhibits consisting of police reports summarizing the obscene nature of the magazines and films exhibited by defendants. Included in the prayers (besides preliminary injunctions, abatement of respective premises under California's Red Light Abatement Law, sale of fixtures and movables to pay fees and costs, and other appropriate relief) were (1) a perpetual injunction of respondents, etc., and anyone acting on their behalf from so operating and conducting the respective premises, and (2) a year's closure of the respective premises under the custody and control of the trial court.

---

6. "Public Nuisance" was defined in terms of California Penal Code section 370 and Civil Code 3479. (See Appendix A, infra.)

Demurrers and Trial Court Ruling

Respondents filed general demurrers to each complaint, asserting that petitioners failed to state a cause of action either under the public nuisance statutes or the Red Light Abatement Law. The trial court, considering itself bound by the decision in Harmer v. Tonylyn Productions, Inc., 23 Cal. App.3d 941 (1972), sustained the demurrers without leave to amend and entered judgments of dismissal. Petitioners appealed.

Disposition on Appeal

There followed successive reversals by the California Court of Appeal (see Appendix D) and the California Supreme Court (see Appendices B and C). Assuming on appeal the truthfulness of the complaints (including the obscenity of all the films and magazines involved), the latter held that (1) a cause of action had been stated under California's general nuisance statutes (California Penal Code section 370, California Civil Code Section 3479 and 3480), (2) California's Red Light Abatement Law did not apply, (3) injunctive relief could be tailored in equity appropriate to each case, and (4) injunctive relief against specific publications could be constitutionally imposed.

California Supreme Court
Treatment of Issue
(First Opinion)

The California Supreme Court, in its first (subsequently vacated) opinion determined to "express no opinion upon the further question whether the court may, in addition [to enjoining further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing,] either close the premises entirely or enjoin further 'obscene' exhibitions regarding materials not yet adjudged obscene." (People ex rel. Busch v. Projection Room Theater, 16 Cal.3d 360, 375; see Appendix C) The Court added that:

> "[s]ince the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration." (People ex rel. Busch v. Projection Room Theater, supra, at 376.)

California Supreme Court
Treatment of Issue
(Second Opinion)

Nevertheless, following respondents'

petition for rehearing, the California Supreme Court vacated its first opinion, and substituted another (see Appendix F) which differed from the first only in a segment wherein it held that "the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution." (People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42, 59; see Appendix B.) This apparently would apply "even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene." (People ex rel. Busch v. Projection Room Theater, supra at 59.)[7]

---

7. Chief Justice Wright, who had dissented on March 4, 1976, now joined the majority, concurring in its June 1, 1976, opinion. Justices Clark and McComb, who had previously concurred entirely, now dissented from the new holding while concurring in the remainder of the opinion. Justice Mosk who

(Footnote Continued)

Thus, by upholding the demurrer as to the particular relief requested in the prayer, the California Supreme Court in essence held that the United States Constitution precludes a state from seeking in its pleadings to close for a year premises which constitute a place of lewdness by virtue of continuous exhibition or dissemination of obscene matter and to enjoin on such premises further activity of the same nature.

Petitioner's Petition For
Reconsideration
Or Modification

Subsequently petitioners filed their petition for reconsideration or modification, contending (1) that the above holding con-

(Footnote 7 Continued)
had previously dissented entirely, now concurred only as to the new holding, continuing his dissent as to the remainder, adding that (unlike the majority) he would hold closure also offensive to Article I, section 2 of the California Constitution which prohibits action that may "restrain or abridge liberty of speech or press". Their rejection of Justice Mosk's reliance upon the state constitution makes it absolutely clear that the majority relied solely upon the federal constitution (compare California v. Krivda, 409 U.S. 33, 35, 34 L.Ed. 2d 45, 46 (1972), 93 S.Ct. 32; reh. den. 409 U.S. 1068, 34 L.Ed.2d 520, 93 S.Ct. 549 and People v. Krivda, 8 Cal.3d 623, 624.)

flicts with this Court's decision in Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923 , 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975), which impliedly upheld closure (with release provisions) where only one obscene film was involved; (2) that the above holding failed to distinguish premises where the "sole emphasis is on the sexually provocative" (cf. Ginzburg v. United States, 383 U.S. 463, 470, 16 L.Ed.2d 31, 37-38, 86 S.Ct. 942, 947 [1966]), as in "adult" or "porno" theaters and bookstores; (3) that the above holding failed to apply "a pragmatic assessment of [the] operation [of the particular type of restraint] in the particular circumstances" (Kingsley Books v. Brown, 354 U.S. 436, 441-442, 1 L.Ed. 2d 1469, 1474, 77 S.Ct. 1325 [1957]) i.e., by considering the effects and limitations of each form of relief in terms of remedial target (purveyor, publication, or premises); and (4) that generic injunctions which, unlike blanket injunctions, incorporate the Miller guidelines and examples, thereby "provid[ing] fair notice to a dealer" of possible prosecution (Miller v. California, 413 U.S. 15, 25, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607, 2615 [1973]). On July 15, 1976, the California Supreme Court denied the foregoing petition. (See Appendix G.)

On August 12, 1976, the California Supreme Court denied petitioner's motion to recall the remittitur or stay proceedings in the trial court. (See Appendix H.)

REASONS FOR GRANTING THE WRIT

A

The California Supreme Court, In Direct Conflict With This Court's Decision In Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975) and in Conflict In Principle With Other Decisions of this Honorable Court, Has Erroneously Concluded that the First and Fourteenth Amendments to United States Constitution Preclude a State From Seeking in its Pleadings to Close for a Year Premises Which Constitute a Place of Lewdness by Virtue of Continuous Exhibition or Dissemination of Obscene Matter.

Conflict With And Misconstruction of This Court's Holdings

1) The California Supreme Court, having before it only the pleadings and assuming the truthfulness thereof (including the obscenity of all materials being continuously exhibited on and dis-

seminated from the respective premises [Projection Room Theater, supra, 17 Cal.3d at 48-49]), held "that to grant the relief sought by plaintiffs (i.e., closing down the premises in question) would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution." (Id. at 58.)

Thus, in essence, California's Court of last resort has held that the federal constitution precludes a state from ever seeking the closure remedy, "even after it has been repeatedly determined that all or substantially all of the magazines or films exhibited or sold therein are obscene" (Projection Room Theater, supra, 17 Cal.3d at 59, compare, id. at 48-9 [quoting pleadings and assuming truth thereof]).

Nevertheless, the above holding of the California Supreme Court appears to be in direct conflict with this Court's decision in Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975) wherein this Honorable Court "dismissed for want of a substantial federal question" an appeal from the Ohio Supreme Court's decision in State ex rel. Ewing v. "Without A Stitch",

(Ohio, 1974) 307 N.E.2d 911, thereby ruling on the merits (see Hicks v. Miranda, ____ U.S. ____, 45 L.Ed.2d 223, 95 S.Ct. 2281, 2289 [1975]) that an order closing a theater which exhibited a single obscene motion picture film for a period of one year was constitutionally valid, at least where the owner could obtain a release by (a) appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the court that he will prevent the nuisance from being reestablished (i.e., the exhibition of the particular film declared obscene). (See, "Without A Stitch", supra, 307 N.E. at 917-918 and U.S. Supreme Court's comment on that case in Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 [1975], at 43 L.Ed.2d 496-497, n. 23 and the last two sentences of text preceding that footnote). Therefore, there is nothing that would constitutionally prevent at least this much abatement relief in the instant case.

2) However, we are not dealing here with the exhibition of a single obscene motion picture film (as in "Without A Stitch")[8/] but with the continual exhibi-

8. The same film was involved in Harmer v. Tonylyn Productions, Inc., 23 Cal.App.3d 941, (Footnote Continued)

tion of obscene films (R.T. in Projection Room Theater case, p. 2, lines 30-32) on premises which hold themselves out to the public as specializing in "Adult Films" (R.T. in Projection Room Theater case, pp. 188:5, 200 [incorporated into complaint at id. 4:18-26]).[9/] If "'[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication'" (Miller v. California, 413 U.S. 15, 25, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607, n. 7 [1973]), it would seem that premises which specialize in obscene films would similarly not be redeemed by an occasional non-obscene film. "Where [as here] the purveyor's sole emphasis is on the sexually provocative aspects of his publication[s] that fact may be decisive in the determination of obscenity" (Ginzburg v. United States, 383 U.S. 463, 470, 16 L.Ed.2d 31, 37-38, 86 S.Ct. 942, 947 [1966]; see also

(Footnote 8 Continued)
distinguished in People ex rel. Hicks v. Sarong Gals, 27 Cal.App.3d 46, 50 (from the standpoint of the Red Light Abatement Law) on the ground that "It cannot be presumed from a single incident that the place will continue to be used to present the obscene material."

9. Affidavits incorporated into the complaint describe the films in detail.

Memoirs v. Massachusetts, 383 U.S. 413, 420, 86 S.Ct. 975, 978 [1966]; United States v. Rebhuhn, 109 F.2d 512 (cert.den. 60 S.Ct. 974; discussed in Ginzburg, 383 U.S. at 472-473) and other cases cited in Ginzburg at n. 14 (383 U.S. at 472). An "adult" or "porno" theater or bookstore is one where the sole emphasis is on the sexually provocative aspects of the films or magazines therein (whatever other qualities such materials may possess in insolation). Thus, closure of such premises cannot possibly infringe upon any substantial First Amendment interest (any protected qualities of the "communication" therein being necessarily ultra vires).

3) Thus, "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. 'What is needed', . . . 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis'" (Kingsley Books v. Brown, 354 U.S. 436, 441-442, 1 L.Ed.2d 1469, 1474, 77 S.Ct. 1325 [1957]).

The California Supreme Court's talismanic indication that closure of a

"theatre" or "bookstore" would necessarily constitute an impermissible prior restraint (Projection Room Theater, supra, 17 Cal.3d at 58-59) must yield to a more particularistic analysis: (1) as to the nature of the nuisance (here premises specializing in sexual provocation) and (2) as to the nature of the remedy (aimed at the particular premises rather than at the publication or purveyor [see A.R.B. 10-15 for more extensive discussion]). We have already discussed, supra, (1) the nature of the nuisance (not an ordinary theater, but a comparatively recent phenomenon, a modern vicarious counterpart to the old-fashioned "house of ill repute" [see A.O.B. p. 8:10-19; pp. 15-16]). As to (2) the nature of the closure remedy, it should be noted (a) that it leaves the purveyors free to disseminate their publications on other premises (People ex rel. Hicks v. Sarong Gals, 42 Cal.App.3d 556, 563)[10/] while rendering the subject premises

10. Compare the effects of license denial or incarceration (on the purveyor) or administrative censorship or injunction (on the publication) (see A.R.B. 10-15 for more extensive discussion). It would appear that remedies directed against the premises are not per se more "drastic" or "chilling" than those directed against the purveyor or

(Footnote Continued)

unavailable to any use (protected or otherwise); and (b) that the sanctions (including closure) are imposed because of past exhibitions (i.e., the nuisance) and not because of what may or may not be shown in the future (i.e., particular films, etc.). (Cf. 106 Forsyth Corp. v. Bishop, 362 F.Supp. 1389, 1396-1397 [M.D. Ga., 1972].) Thus, "a pragmatic assessment" of the operation of closure in the instant case compels the conclusion that it is not an invalid prior restraint.

4) With the Kingsley Books requirements in mind, we proceed to examine decisions of this Court cited by the California Supreme Court in support of its proposition that closure of a "theater" or "bookstore" necessarily constitutes an impermissible prior restraint. It should be remembered that we are merely at the demurrer stage herein and that the exact bounds of relief appropriate herein have yet to be described by the trial court. This factor alone dis-

---

(Footnote 10 Continued)
his publication. Therefore, "[i]t is not for this court thus to limit the State in resorting to various weapons in the armory of the law." (Kingsley Books v. Brown, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325 [1957].)

tinguishes post-judgment cases which, unlike the California Supreme Court herein were not imposing or precluding a state from ever seeking the closure remedy in its pleadings.

Cited in support of the California Supreme Court's "prior restraint" ruling were the following decisions of this Court: "Near v. Minnesota (1931) 283 U.S. 697, 711-715, 720; Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 70-71; Freedman v. Maryland, supra, 380 U.S. 51, 57; Carroll v. President and Commissioners of Princess Anne (1968) 393 U.S. 175, 180-181; see and compare Kingsley Books, Inc. v. Brown, supra, 354 U.S. 436." (Projection Room Theater, supra, 17 Cal.3d at 58.) None of these decisions invalidated closure or generic injunctions limited to the premises, but rather dealt with restraints against publications. Therefore, they are clearly inapposite here.

5) Despite the California Supreme Court's curious implication that it was unaware of authority adverse to its conclusion, (People ex rel. Busch v. Projection Room Theater, supra, 17 Cal.3d at 59), Justice Clark's concurring and dissenting opinion quotes a passage from

that Court's original opinion, citing six cases which "suggest that such further forms of relief would be appropriate and constitutionally permissible. [Citations.]" (Id. at 62-63, Clark, J., dissenting, quoting from vacated opinion, 16 Cal.3d at 375-376.)[12/]

B

The California Supreme Court, In Conflict In Principle With Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), Has Erroneously Concluded That The First and Fourteenth Amendments to the United States Constitution Preclude a State from Seeking in its Pleadings to Perpetually Enjoin the Further Operation as a Public Nuisance of Premises Which Constitute a Place of Lewdness By Virtue of Continuous Exhibition or Dissemination of Obscene Matter.

---

12. Among cases cited to that court by petitioner was Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975). (See our Answer to Petition for Rehearing filed March 29, 1976, p. 10, lines 5-7, also citing Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, 1212 [1975], at n. 23 and related portion of text.)

The California Supreme Court held that "the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution." (Projection Room Theater, supra, 17 Cal.3d at 59.)

Thus, in essence, California's Court of last resort has held that the federal Constitution precludes a state from ever seeking the remedy of a generic injunction against further operation of the premises as a nuisance (even where continuously exhibiting or disseminating obscenity).

Although not expressly stated, the defect no doubt seen in "blanket injunctions" of obscenity is that they do not define what is obscene so as to give fair notice of what constitutes a violation (cf. Mitchem v. State ex rel. Schaub (Fla., 1971) 250 So.2d 883, 886). Although this objection might have weight as to injunctions merely worded in terms of "obscenity" (without expressly incorporating any definition thereof), it would seem no longer viable as to generic injunctions phrased in terms of the two

examples given in Miller v. California, supra, 413 U.S. 15, 25, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607 (1973). So worded, such injunctions "will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution [or, a fortiori, civil relief]" (id. at 413 U.S. 27, 37 L.Ed.2d 432-433). Nor need the purveyor fear unless he contemptuously deals in patently offensive "hard core" obscenity, (the only matter unprotected by the First Amendment). (Miller, supra, 413 U.S. at 27, 37 L.Ed.2d at 432.)

Based on the Miller guidelines, Justice Maddox, concurring in General Corp. v. State ex rel. Sweeton, (Ala. 1975), 320 So.2d 668, 675 (cert. den. Sweeton v. General Corp., ___ U.S. ___, 18 Cr.L. 4206, No. 75-1011 [plurality opinion below]) drew the logical conclusion:

> "The only constitutional problem I see in this case is the prior restraint inherent in the injunctive relief granted, but I believe relief could be tailored which would regulate illegal conduct, protect First Amendment rights, and would permit the operation of the business to show films which were not obscene.

> In short, the trial judge had voluminous evidence before him that the Fox Cinema Theatre was being used for an illegal activity. Faced with this overwhelming evidence of a pattern and practice of illegal conduct, and having determined the obscenity vel non of the films which were shown there, the trial court could have enjoined the further use of the theatre to show films which were '(a) Patently offensive representations or descriptions of ultimate sexual acts; normal or perverted, actual or simulated; (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.'

"Under Miller, I believe the trial judge, under authority of Alabama's Red Light Abatement Act could permanently enjoin the use of the theatre for showing obscene films and could require anyone desiring to use the theatre for a legitimate purpose to submit a plan which would show the purpose for which the theatre would be used and the trial court could determine promptly whether the proposed use was for a legitimate purpose, using the Miller standard, of course."

(Compare the similar release provisions of State ex rel Ewing v. "Without a Stitch" [Ohio, 1974] 307 N.E.2d 911, upheld by this Court in Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 [1975].)

Far from casting "an appalling chill upon the exercise of freedom of expression in this state" as respondent claimed in his petition for rehearing in the California Supreme Court (at p. 13, lines 11-13), injunctive remedies with proper constitutional safeguards (such as the prior adversary

hearing required here [Projection Room Theater, supra, 17 Cal.3d at 59-60] or the plan envisioned by Justice Maddox in General Corp. v. Sweeton, 320 So.2d 668) "provide[ ] an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation" (Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55, 37 L.Ed.2d 446, 455, 93 S.Ct. 2628, as quoted below in Projection Room Theater, supra, 17 Cal.3d at 55), notice far better than would precede an ordinary criminal action with threat of incarceration. (See dissenting opinion of Justice Douglas in Miller v. California, supra, 413 U.S. at 41-43, 37 L.Ed.2d at 441-442, 93 S.Ct. 2607 (1973), (wherein he recommends that administrative censorship precede any criminal prosecution; see also California Supreme Court's opinion in Zeitlin v. Arnebergh, 59 Cal.2d 901, 905-907).)

Ignoring the foregoing constitutional principles established by this Court, the California Supreme Court has preferred a talismanic approach resulting in a blanket prior restraint on the trial court.

C.

The Constitutionality Per Se of the Remedies of Closure and Generic Injunction Limited to the Premises As Applied to "Adult" Motion Picture Theaters and Bookstores Presents "A Federal Question of Substance" Within the Meaning of Rule 19(a) of the Rules of this Court.

It is clear that "a federal question of substance" is involved here (see Rule 19 (a), Rules of the Supreme Court of the United States). As this Court stated in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60, 37 L.Ed.2d 446, 458, 93 S.Ct. 2628, n.10 (1973), "'we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments.' [Citation.]"

Not only has this Court "often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and uncon-

senting adults" (Id. at 413 U.S. 57, 37 L.Ed. 2d 456), it has also held that "there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby." (Id. at 413 U.S. 57, 37 L.Ed.2d 457 [footnote omitted])

As this Court has recognized "[r]ights and interests 'other than those of the advocates are involved.' [Citations.] These include the interest of the public in the [quality] of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." (Id. at 413 U.S. 58, 37 L.Ed.2d 457.)

In addition, the appearance "of societal approval" created by the unencumbered proliferation of porno specialty houses (denominated "adult") is "'another potent influence on the developing ego'" (Ginsberg v. New York, 390 U.S. 629, 642, 20 L.Ed.2d 195, 205-206, 88 S.Ct. 1274, n. 10; compare Paris Adult Theatre I, supra, 413 U.S. 58, 37 L.Ed.2d 457, 93 S.Ct. 2628, n. 7).

Turning to the issue of remedy, this Court has been careful to state (with particular regard to state efforts "to protect its people against the dissemination

of pornography"),

> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. [Citations]" (Kingsley Books v. Brown, 354 U.S. 435, 441, 1 L.Ed.2d 1469, 1474, 77 S.Ct. 1325 [1975].)

Foreclosing in advance (as necessarily unconstitutional) the forms of relief particularly requested in the complaint (a year's closure of premises and a perpetual injunction against further operation thereof as a nuisance), the California Supreme Court concluded that abatement "must be directed to particular books or films which have been adjudged obscene following a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed." (Projection Room Theater, 17 Cal.3d 42, 59.)

Thus, the People are relegated to a

piecemeal approach of litigating each item one at a time (cf. Kingsley Books v. Brown, supra, 354 U.S. at 440, 1 L.Ed.2d at 1473), an approach which cannot be successful against premises which specialize in obscenity but constantly turn over their stock, substituting new (assembly line) titles for old (and new issues of monthly porno magazines for old). This is especially true in the case of "adult" or "porno" movie theaters which normally would only show a particular film for a limited period of time, even though (as assumed herein by the court below) all the films that are shown there are obscene. By the time the prior adversary hearing is concluded as to old magazines or films, said old magazines or films will have been replaced by new (unlitigated) ones. Of course, with each change of purveyor, even titles once found obscene in other hands will have to be relitigated (see McKinney v. Alabama, ____ U.S. ____, 44 U.S.L.W. 4330 [No. 74-532, March 23, 1976]).

Thus, with the rise of a new form of the traditional house of ill fame (adult bookstores and movie theaters), the California Supreme Court has concluded that it is constitutionally compelled to remove from the armory of the law those weapons focused on

the premises (closure and related generic injunctions). The result is a unilateral disarmament which cannot preserve the right to a decent society from "the tide of commercial obscenity" (see Paris Adult Theatre I, supra, 413 U.S. at 57, 37 L.Ed. 2d at 457, 93 S.Ct. at 2635).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

JOHN K. VAN DE KAMP
District Attorney of
Los Angeles County
Member of the Bar of
the Supreme Court of
the United States

Of Counsel:

By

HARRY B. SONDHEIM
Head, Appellate Division

DIRK L. HUDSON
Deputy District Attorney

Attorneys for Petitioner

(Remaining Counsel Listed
On Next Page)

BURT PINES, City Attorney
of City of Los Angeles

By

RICHARD M. HELGESON
Deputy City Attorney

Attorneys for Petitioner

Members of the Bar of the
Supreme Court of the
United States

1700 City Hall East
Los Angeles, California 90012
Telephone: 485-3801

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-340

THE PEOPLE ex rel. JOHN K. VAN DE KAMP
as District Attorney, etc., et al.,

Petitioners,

v.

PROJECTION ROOM THEATER, et al.,

Respondents.

(and 4 other cases)

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP
District Attorney of
Los Angeles County
Member of the Bar of
the Supreme Court of
the United States

Of Counsel: HARRY B. SONDHEIM
Head, Appellate Division

DIRK L. HUDSON
Deputy District Attorney

849 So. Broadway, 11th Floor
Los Angeles, California 90014
Telephone: 974-5921

Attorney for Petitioner

APPENDICES

APPENDIX A

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution,
First Amendment

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . "

United States Constitution,
Fourteenth Amendment,
Section 1

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . "

California Penal Code
Section 370

"Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance."

California Civil Code
Section 3479

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, steam, canal, or basin, or any public park, square, street, or highway is a nuisance."

California Civil Code
Section 3480

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

California Civil Code
Section 3491

"The remedies against a public nuisance are:

"1. Indictment or information;

"2. A civil action; or,

"3. Abatement."

California Penal Code
Section 311

As used in this chapter:

"(a) 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

"(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

"(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

"b) 'Matter' means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means being aware of the character of the matter or live conduct.

"(f) 'Exhibit' means to show."

APPENDIX B

(Facsimile)

[L.A. Nos. 30432 to 30436. In Bank. June 1, 1976.]

*THE PEOPLE ex rel. JOSEPH P. BUSCH, as District Attorney, etc. et al., Plaintiffs and Appellants, v. PROJECTION ROOM THEATER et al., Defendants and Respondents. (And 4 other cases.)**

OPINION

RICHARDSON, J.--In these consolidated cases we consider whether or not a civil action brought by law enforcement officers to restrain the exnibition of obscene books and films states a cause of action for relief under the public nuisance laws of this state. Plaintiffs, who are law enforcement officers acting on behalf of both the City and the County of Los Angeles, seek injunctive and other relief against defendants who, according to the five separate complaints filed herein, operate book stores or motion picture theaters in Los Angeles which exhibit magazines or films that are obscene under the laws of this

*These cases were previously entitled Busch v. Projection Room Theater, etc.

**People ex rel. Busch v. Stan's Books (L.A. No. 30433); People ex rel. Busch v. Book Bin (L.A. 30434); People ex rel. Busch v. Jason's Books (L.A. No. 304350; People ex rel. Busch v. Galaxy Book Store (L.A. No. 30436).

state. While the five complaints are directed at different defendants and vary somewhat in the specifics of their allegations, the causes of action alleged in each are sufficiently similar in the facts alleged and in the charging allegations to permit us to consider them together.

For convenience we examine the pleadings in the case involving Projection Room Theater finding that our conclusions in that action are dispositive of the issues raised in all of the actions. Plaintiffs assert that defendants' operations constitute public nuisances which are subject to regulation and abatement either pursuant to the general public nuisance statutes (Civ. Code, § § 3479, 3480; Pen. Code, § § 370, 371), or under the Red Light Abatement Law (Pen. Code, § 11225 et seq.). Defendants dispute the contention. We will conclude that although the Red Light Abatement Law was not intended to apply to the exhibition of obscene magazines or films, nevertheless the complaint herein does state a cause of action under the general public nuisance statutes.

The complaint herein alleges the following facts: Defendants own or operate specified premises in Los Angeles County in which acts of "lewdness" are taking place, namely, the "past and continuing exhibition" of magazines and films "all of which are lewd and obscene under the laws of this State, and therefore did and do constitute a nuisance under the laws of this State . . . ." It is further alleged that the magazines and films so exhibited by defendants have, as their dominant theme, an "appeal to the prurient interest in sex," that they are "patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters," and that they are "utterly without social value . . . ."

According to the complaint, the maintenance of these premises constitutes a public nuisance which will continue unless restrained and enjoined. Plaintiffs attached to the complaint numerous exhibits consisting of police reports summarizing the obscene nature of the magazines and films exhibited by defendants. The complaint sought

multiple relief including: (1) preliminary injunction restraining defendants from conducting and maintaining the premises for the purposes described above; (2) abatement of the premises as a public nuisance under sections 11230-11231 of the Penal Code (Red Light Abatement Law); (3) permanent injunction against defendants and their agents, officers and employees from operating the premises as a public nuisance; (4) closure of the premises for one year; (5) removal and sale of the fixtures and movable property thereon used in conducting the nuisance; (6) use of the proceeds from the sale to pay fees and costs in connection with the closure; and (7) other appropriate relief.

Defendants filed general demurrers to each complaint, asserting that plaintiffs failed to state a cause of action either under the public nuisance statutes or the Red Light Abatement Law. The trial court considering itself bound by the decision in Harmer v. Tonylyn Productions, Inc. (1972) 23 Cal.App.3d 941 [100 Cal.Rptr. 576, 50 A.L.R. 3d 959], sustained the demurrers without leave to amend and entered judgments of dismissal. Plaintiffs appeal.

The scope of our inquiry herein is considerably narrowed by application of the familiar rule, acknowledged by defendants, that "a general demurrer admits the truth of all material factual allegations in the complaint" (Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal.3d 493, 496 [86 Cal.Rptr. 88, 468 P.2d 216]), and we may accordingly assume that all materials in question, both magazines and films, are obscene within the meaning of Penal Code section 311, as alleged.

1. Public Nuisance Statutes

We first consider whether or not the allegations of the complaint, summarized above, sufficiently describe the existence of a public nuisance and note preliminarily the substantial identity of definitions appearing in Penal Code sections 370 and 371, and Civil Code sections 3479 and 3480, taken in conjunction. Section 370 of the Penal Code defines a public nuisance as "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by

any considerable number of persons, . . ." (Italics added.) When analyzed, section 370 reveals the following: the proscribed act may be anything which alternatively is injurious to health or is indecent or offensive to the senses; the results of the act must interfere with the comfortable enjoyment of life or property; and those affected by the act may be an entire neighborhood or a considerable number of persons, and as amplified by Penal Code section 371 the extent of the annoyance or damage on the affected individuals may be unequal.

Is the exhibition of obscene magazines and films a form of activity which may be characterized as "indecent" or "offensive to the senses" interfering with the comfortable enjoyment of life of a "considerable number of persons" within the contemplation of Penal Code section 370? We conclude that such exhibitions may fairly be deemed such conduct, and we find convincing support for such conclusion from applicable cases in this and other jurisdictions.

In Weis v. Superior Court (1916) 30 Cal.App. 730 [159 P. 464], the Court of Appeal ruled that an attraction known as the "Sultan's Harem," conducted at the Panama-California International Exposition, constituted a public nuisance subject to abatement. This exhibition assertedly involved the "indecent and offensive" exposure to members of the public of the "naked persons and private parts thereof" of various female employees. Although such conduct also constituted the crime of indecent exposure (Pen. Code, § 311), nevertheless the Weis court held that "[w]here, however, the threatened acts, if committed, in addition to being an indictable offense, will constitute a public nuisance, courts of equity are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the maintenance thereof. [Citation.]" (Weis at p. 732.) Furthermore, the court, quoting from Wood on Nuisances (§ 68), stated that " 'A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene

pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious . . . and disorderly members of society.' " (Ibid., italics added.)

The foregoing Weis reasoning was approved by us more than 30 years ago in People v. Lim (1941) 18 Cal.2d 872, 879 [118 P.2d 472]. Lim involved the propriety of an injunction against gambling activities on the ground that they constituted a public nuisance. We upheld in Lim the use of the public nuisance injunctive remedy against gambling activity which, it was alleged, disturbed the public peace and corrupted public morals. In Lim we carefully traced the history of public nuisance actions and noted that "The courts have . . . refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance." (P.879.) Although, as we noted, such activities as gambling or usury do not fit comfortably within the above quoted statutory definition of public nuisance, in Lim we acknowledged that an "indecent" exhibition such as was

involved in Weis could be enjoined despite the concurrent application of the criminal statutes, since such exhibitions if determined to be indecent are expressly declared by section 370 to be public nuisances.

While carefully noting that Weis involved live dance performances, we discern no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and "live" performances on the other. The presentation of either may fairly be described as "indecent" and equally injurious to public morals.

Defendants have insisted that only those activities may constitute public nuisances which are offensive to the five senses of hearing, sight, touch, smell, and taste. It is claimed that public nuisance and abuse of the five senses is coextensive. Defendants in so arguing focus only upon that category of nuisances described in Penal Code section 370 and Civil Code section 3479 as conduct which is "offensive to the senses." The contention is erroneous for such reasoning completely ignores the additional language appearing in both sections which explicitly

includes as an alternative class of public nuisance conduct "anything which is indecent." When the question is put, which of the five senses is offended by conduct that is "indecent," it becomes readily apparent both that the thesis of the argument does not fit the legislative language and that conduct offensive to a community's moral sensibilities is likewise subject to regulation under section 370. Thus, the court in Weis, supra, at page 733, unequivocally states that " . . . any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance," (Italics added.)

The trial court herein, in sustaining defendants' demurrers without leave to amend, considered itself controlled by the holding in Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941 (hg. den.). Harmer is distinguishable, however, since it involved an action by private citizens to enjoin a particular film being shown at the premises in question. The Harmer court

ruled that plaintiff had failed to allege the necessary special damages requisite to bringing a public nuisance action (see Civ. Code, § 3493) thus casting doubt upon his status as a litigant. In contrast, the instant action is brought by public officials acting on behalf of the public generally and proceeding under provisions (see Code Civ. Proc., § 731) which expressly confer standing upon them.

More fundamentally, however, Harmer fails properly to analyze the nature of the state's interests in regulating the exhibition of obscene matter. Harmer suggests that since "only those members of the community were exposed to the film who voluntarily chose to see it," therefore "[t]he nuisance was not one which is inflicted or imposed on the public." (Harmer at p. 943.) Such reasoning frequently advanced and variously stated, misses the point. The fact that obscene or other indecent exhibitions take place behind closed doors and are viewed only by those who choose to view them does not defeat the community's interest in regulating such exhibitions.

Substantially identical arguments were advanced and rejected by us recently in People v. Luros (1971) 4 Cal.3d

84 [92 Cal.Rptr. 833, 480 P.2d 633], and by the United States Supreme Court in Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49 [37 L.Ed.2d 446, 93 S.Ct. 2628]. In both Luros and Paris, the argument was made that the state had no legitimate interest in regulating the exhibition and distribution of obscene matter to consenting adults. Defendants in each case urged that Stanley v. Georgia (1969) 394 U.S. 557 [22 L.Ed.2d 542, 89 S.Ct. 1243], was controlling on this point. Stanley, however, held only that private possession of obscene matter cannot constitutionally be made a crime. In Luros, we carefully noted the important distinction, recognized by the federal Supreme Court in Stanley, between commercial distribution of obscenity and the private possession thereof. We concluded that "... in the context of public distribution of obscenity, the balance of interests upholds the constitutionality of state regulation, even though that regulation imposes some burdens upon the exercise of constitutional rights. [¶] ... States retain broad power to regulate obscenity and regulation of the public distribution of obscenity falls well within the broad scope of that power."

(4 Cal.3d at pp. 92-93.) We reaffirm the foregoing conclusion reached by us in Luros.

Similarly, Paris (decided after Harmer was filed) rejected the extension of Stanley to situations involving consenting adults. The high court specifically addressed the Harmer limitation on the scope of the public interest, and "categorically disapprove[d] the theory.... that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only." (413 U.S. at p. 57 [37 L.Ed.2d at p. 456]; see also pp. 57-69 [37 L.Ed.2d pp. 456-464].) The court noted that "[t]he States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodations, as long as these regulations do not run afoul of specific constitutional prohibitions. [Citations.]" (Id., at p. 57 [37 L.Ed.2d at p. 457].) These "legitimate interests" include "the interest of the public in the quality of life and the total community environment; the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority

Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime." (Fn. omitted; id., at p. 58 [37 L.Ed.2d at p. 457], italics added.) Further, "[a]lthough there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist." (Id., at pp. 60-61 [37 L.Ed.2d at p. 459].)

Following its rejection of the argument that Stanley forbids state regulation of the exhibition or distribution of obscene matter, the Paris court very significantly observed: "Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such

material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States 'right . . . to maintain a decent society.' [Citation.]" (Italics added; Paris at pp. 68-69 [37 L.Ed.2d at pp. 463-464].) Both Luros and Paris explain and confirm that the interests of those who voluntarily view and purchase obscene materials are not necessarily coextensive with the interests of the community at large.

Even more recently the United States Supreme Court has noted that a state's public nuisance action seeking to close a theater exhibiting obscene films constituted an effort "to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." (Fn. omitted; Huffman v. Pursue, Ltd. (1975) 420 U.S. 592, 605 [43 L.Ed.2d 482, 492, 95 S.Ct. 1200].)

Thus, the Paris court has clearly held that states may constitutionally determine that public exhibition of obscene material has a tendency to injure the community or to jeopardize the maintenance of a decent society. In

Luros we confirmed the validity of state regulation of the commercial distribution of obscene materials. The legislative definition of a public nuisance includes "[a]nything which is . . . indecent, or offensive to the senses, . . . so as to interfere with the comfortable enjoyment of life or property by a . . . community or neighborhood, or . . . any considerable number of persons . . . ." (Pen. Code, § 370.) California's public nuisance definition, including as it does indecency, comports fully with the state's power to regulate as recently declared both by the federal Supreme Court and by ourselves and fortifies our conclusion that public nuisance laws may properly be employed to regulate the exhibition of obscene material to "consenting adults."

Given the legitimate state interests in controlling the exhibition of obscenity, carefully outlined in Paris, it is not surprising that a wide variety of cases, both before and after Paris, have confirmed that such exhibitions constitute nuisances which properly may be abated by the courts. (Grove Press, Inc. v Flask (N.D. Ohio 1970) 326 F.Supp. 574, vacated and remanded on other grounds, 413

U.S. 902 [37 L.Ed.2d 1013, 93 S.Ct. 3026]; Bloss v Paris Township (1968) 380 Mich. 466 [157 N.W.2d 260, 261]; Cactus Corporation v. State ex rel. Murphy (1971) 14 Ariz.App. 38 [480 P.2d 375]; Evans Theatre Corporation v. Slaton (1971) 227 Ga. 377 [180 S.E.2d 712], cert. den., 404 U.S. 950 [30 L.Ed.2d 267, 92 S.Ct. 281]; New Rivieria Arts Theatre v. State (1967) 219 Tenn. 652 [412 S.W.2d 890, 893-895]; Sanders v. State (1974) 231 Ga. 608 [203 S.E.2d 153, 156-157]; State ex rel. Ewing v. "Without A Stitch" (1974) 37 Ohio St.2d 95 [66 Ohio Ops.2d 223, 307 N.E.2d 911], app. dism., 421 U.S. 923 [44 L.Ed.2d 82, 95 S.Ct. 1649]; State ex rel. Keating v. Vixen (1971) 27 Ohio St.2d 278 [56 Ohio Ops.2d 165, 272 N.E.2d 137], vacated and remanded on other grounds, 413 U.S. 905 [37 L.Ed.2d 1016, 93 S.Ct. 3033], opn. on remand, 35 Ohio St.2d 215 [64 Ohio Ops.2d 366, 301 N.E.2d 880]; State ex rel. Little Beaver Theatre, Inc. v. Tobin (Fla. App. 1972) 258 So.2d 30, 31-32; State v. Morley (1957) 63 N.M. 287 [317 P.2d 317, 318-319]; see, generally, note (1975), 10 U.S.F.L.Rev., 115).

Each of the above cases either expressly or implicitly recognizes that the exhibition of obscene magazines or

films constitutes a public nuisance properly subject to abatement. For example, the Georgia Supreme Court in Evans upheld application of a general public nuisance statute to an allegedly obscene film, "I Am Curious (Yellow)." The court explained that "[i]f any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.... The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film." (180 S.E.2d at pp. 715-716.)

Evans was cited and discussed with approval in Paris, supra, 413 U.S. 49, 54-55 [37 L.Ed.2d 446, 454-456], wherein the court expressly approved use of public nuisance actions to enjoin the exhibition of obscene materials. Since this portion of Paris is critical to our

analysis, we quote it in its entirety:

"Georgia case law permits a civil injunction of the exhibition of obscene materials. [Citations, including Evans, supra.] While this procedure is civil in nature, and does not directly involve the state criminal statute proscribing exhibition of obscene material, the Georgia case law permitting civil injunction does adopt the definition of obscene materials' used by the criminal statute. Today, in Miller v. California, supra, we have sought to clarify the constitutional definition of obscene material subject to regulation by the State, and we vacate and remand this case for reconsideration in light of Miller.

"This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictment, as to whether the materials are unprotected by the First Amendment and subject to state regulation. [Citation.] Here, Georgia imposed no

restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. Thus the standards of [prior United States Supreme Court decisions] were met." (Italics added; Paris at pp. 54-55 [37 L.Ed.2d at pp. 454-456].)

Similarly, as we explain hereinafter, the California public nuisance statutes must be enforced in such a way as to operate in a constitutional fashion. So applied, as the foregoing cases make clear, there is no overriding principle of law which precludes the states from regulating the exhibition of obscene matter by application of their public nuisance statutes. To this extent, Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941, is disapproved.

We do not suggest, of course, that law enforcement officers in each city and county in this state have a mandatory duty always and everywhere to abate the exhibition of obscene matter within their borders. The particular nature of the exhibition, and its effect upon the

community, may vary considerably in time and place. Law enforcement officers accordingly are vested with wide discretion to decide whether or not to initiate the kind of formal abatement proceedings such as those instituted in the matters before us. (See Code Civ. Proc., § 731.) Once a community through its public officials has determined that a particular display of obscene materials amounts to a public nuisance which is injurious to the safety and morals of that community, no valid reason exists why, adequate constitutional procedural safeguards being met, the remedy of civil abatement proceedings must be denied such community. The availability of the public nuisance procedure may prove useful for those local entities which, determining that they are confronted with commercial exploitation of obscene materials resulting in the conditions contemplated in section 370, elect to use it.

We consider and will reject several constitutional objections raised by defendants.

Defendants first suggest that the statutory language "indecent, or offensive to the senses" (Pen. Code, § 370) is

impermissibly vague, requiring them to guess as to its meaning, and thus is violative of the First Amendment to the federal Constitution. Several cases involving similar language have avoided the constitutional problem by construing such language as synonymous with the word "obscene," as defined in the applicable statutes and case law. (See In re Giannini (1968) 69 Cal.2d 563, 571, fn. 4 [72 Cal.Rptr. 655, 446 P.2d 535] ["lewd or dissolute conduct"]; Silva v. Municipal Court (1974) 40 Cal.App.3d 733, 736-737 [115 Cal.Rptr. 479] [same]; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578 ["lewd, indecent, lascivious or obscene"]; Janus Films, Inc. v. City of Fort Worth (Tex.Civ.App. 1962) 354 S.W.2d 597, 600 ["indecent"]; State ex rel. Ewing v. "Without A Stitch," supra, 307 N.E.2d 911, 914-915 ["obscene" construed in light of recent United States Supreme Court opinions].)

Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts. "If and when such a 'serious doubt' is raised as to the vagueness of

the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material [in federal statutes], we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California . . . ." (Italics added; United States v. 12 200-Ft. Reels of Film (1973) 413 U.S. 123, 130, fn. 7 [37 L.Ed.2d 500, 507, 93 S.Ct. 2665]; accord, Hamling v. United States (1974) 418 U.S. 87, 114 [41 L.Ed.2d 590, 618-619, 94 S.Ct. 2887].) Indeed, in Bloom v. Municipal Court (1976) 16 Cal.3d 71, 81 [127 Cal.Rptr. 317, 545 P.2d 229], we have construed our own obscenity statute (Pen. Code, § 311, subd. (a) ["obscene matter"]) as referring to the patently offensive matter set forth in Miller, supra, and have rejected the contention that the statute is unconstitutionally vague. (Accord, People v. Enskat (1973) 33 Cal.App.3d 900 [109 Cal.Rptr. 433].) We find no impediment to use of the remedy on grounds of statutory vagueness.

Defendants next assert that use of the public nuisance statutes to enjoin or otherwise abate the exhibition

of films or magazines violates the constitutional principle against prior restraint of presumptively protected materials. (See Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 558 [43 L.Ed.2d 448, 459, 95 S.Ct. 1239]; United States v. Thirty-seven Photographs (1971) 402 U.S. 363, 367 [28 L.Ed.2d 822, 828, 91 S.Ct. 1400]; Freedman v. Maryland (1965) 380 U.S. 51, 58 [13 L.Ed.2d 649, 654, 85 S.Ct. 734]; Kingsley Books, Inc. v. Brown (1957) 354 U.S. 436 [1 L.Ed.2d 1469, 77 S.Ct. 1325].) We note preliminarily that, as the foregoing cases make clear, prior restraints are not unconstitutional per se; a prior restraint may avoid constitutional infirmity if it occurs " 'under procedural safeguards designed to obviate the dangers of a censorship system.' " (Southeastern Promotions, Ltd., supra, at p. 559 [43 L.Ed.2d at p. 460].) Among other safeguards, "a prompt final judicial determination must be assured." (Id., at p. 560 [43 L.Ed.2d at p. 460].)

In order properly to evaluate defendants' prior restraint contention, we first review the possible forms of relief available to plaintiffs in an ordinary public nuisance action. The public nuisance statutes, unlike the Red

Light Abatement Law, do not provide for such specific forms of relief as temporary and perpetual injunction (Pen. Code, §§ 11226-11227), removal and sale of fixtures, and closure of the premises for one year (Pen. Code, § 11230). Instead, the district attorney or city attorney is, in general terms, empowered to bring a civil action to "abate" the public nuisance. (Code Civ. Proc., § 731.) Further, " 'An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case. . . .' " (Italics added; Guttinger v. Calaveras Cement Co. (1951) 105 Cal.App.2d 382, 390 [233 P.2d 914]; see generally McQuillin, Municipal Corporations, § 24.73.)

Thus, in the matters before us if the trial court finds the subject matter obscene under prevailing law an injunctive order may be fashioned that is "proper and suitable" in each case. It is entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing. (Paris Adult Theatre I v. Slaton, supra, 413 U.S. 49, 54-55

[37 L.Ed.2d 446, 454-456] [approving Georgia abatement procedure]; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 579; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; State ex rel. Ewing v. "Without A Stitch," supra, 307 N.E.2d 911, 914; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Keating v. Vixen, supra, 272 N.E.2d 137; see Commonwealth v. Guild Theatre, Inc. (1968) 432 Pa. 378 [248 A.2d 45]; Grove Press Inc. v. City of Philadelphia (3d Cir. 1969) 418 F.2d 82, 90-91; Sanders v. State, supra, 203 S.E.2d 153, 156-157.)

In the cases at bench, in addition to relief under the Red Light Abatement Act (Pen. Code, § 11225 et seq.),[1] plaintiffs seek a preliminary injunction enjoining and restraining defendants "from conducting and maintaining said premises hereinabove described . . . for the purposes of lewdness and from permitting such acts to take place therein and thereon . . . [and further pray that they] be perpetually enjoined from operating and conducting said

[1]As we explain infra, this enactment is inapplicable to any of the cases before us.

premises as a public nuisance." Both in their briefs and at oral argument plaintiffs have made abundantly clear that, as the prayers of their complaints state, the relief they seek is the abatement and closing down of movie theaters and bookstores exhibiting and selling films and magazines determined to be obscene. Although we have concluded upon well recognized principles of pleading that plaintiffs' complaints state actionable causes for the enjoining of the exhibition and sale of specific obscene materials, we are satisfied that to grant the relief sought by plaintiffs (i.e., closing down the premises in question) would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution. (See Near v. Minnesota (1931) 283 U.S. 697, 711-715, 720 [75 L.Ed. 1357, 1365-1367, 1369, 51 S.Ct. 625]; Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 70-71 [9 L.Ed. 584, 593-594, 83 S.Ct. 631]; Freedman v. Maryland, supra, 380 U.S. 51, 57 [13 L.Ed.2d 649, 653-654]; Carroll v. Princess Anne (1968) 393 U.S. 175, 180-181 [21 L.Ed.2d 325, 330-331, 89 S.Ct. 347]; see and compare Kingsley Books,

Inc. v. Brown, supra, 354 U.S. 436; see also Perrine v. Municipal Court (1971) 5 Cal.3d 656, 664-665 [97 Cal.Rptr. 320, 488 P.2d 648]; Flack v. Municipal Court (1967) 66 Cal.2d 981, 985-990, passim [59 Cal.Rptr. 872, 429 P.2d 192].) The courts of a number of our sister states have similarly held that such prior restraints as here sought by plaintiffs are constitutionally impermissible. (See General Corporation v. State ex rel. Sweeton (Ala. 1975) 320 So.2d 668, 675 (plurality opn.); Gulf States Theatres of La., Inc. v. Richardson (La. 1973) 287 So.2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So.2d 883, 886-887; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; Sanders v. State, supra, 203 S.E.2d 153, 156-157; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Ewing v. "Without A Stitch," supra, 307 N.E.2d 911, 917-918; but see People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App.3d 556, 562-563 [117 Cal.Rptr. 24]; Bloss v. Paris Township, supra, 157 N.W.2d 260; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578-580; United Theaters of Fla., Inc. v. State ex rel. Gerstein (Fla.App. 1972) 259 So.2d 210, 212-213, vacated

and remanded 419 U.S. 1028 [42 L.Ed.2d 304, 95 S.Ct. 510].)

Thus, in Sanders, the Georgia Supreme Court pointed out that "One obscene book on the premises of a book store does not make an entire store obscene. The injunction closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards [prior notice and a prompt judicial hearing] and creating an unconstitutional restraint upon appellant. This broad result cannot be reconciled with free expression under our Constitutions." (P. 157.)

We are aware of no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene. Indeed plaintiffs have directed our attention to no such precedents, have presented nothing to countermand or distinguish the authorities referred to above, and at oral

argument stated they could find no authority justifying the closing of bookstores in such circumstances. While we have concluded that a court of equity, having determined particular magazines or films to be obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, we emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution.

We therefore hold that abatement in the present action must be directed to particular books or films which have been adjudged obscene following a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed.

Defendants finally maintain that since the public nuisance statutes are silent with respect to prior adversary hearings, this court should not undertake to "rewrite" those statutes to require such hearings. Such a contention

lacks merit. We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145 [109 Cal.Rptr. 897, 514 P.2d 697]; In re Kay (1970) 1 Cal.3d 930, 941-942 [83 Cal.Rptr. 686, 464 P.2d 142].) Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions. (State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 31-32; see United States v. Thirty-seven Photographs, supra, 402 U.S. 363, 367-373 [28 L.Ed.2d 822, 828-832].) As hereinabove expressed, abatement of a nuisance is accomplished by means of a "proper and suitable" injunction. In the context of assertedly obscene magazines and films, a "roper" injunction ordinarily is one that is issued after the requisite adversary hearing has taken place.

We emphasize that the proceedings now before us remain at the pleading stage. Having determined that plaintiffs' complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise

dimensions of the injunctive and other relief which might be suitable in this and the related cases. It is enough that the parties and the trial court recognize that substantial constitutional issues are presented in this litigation, and that care must be exercised to assure that defendants' constitutional rights are not infringed. More than this is not required.

2. Red Light Abatement Law

As an alternative theory of relief, plaintiffs allege that defendants' exhibition of obscene magazines and films constitutes a nuisance subject to abatement under the provisions of the Red Light Abatement Law (Pen. Code, § 11225 et seq.). We have previously noted that these provisions prescribe certain specific forms of relief not available under the general nuisance statutes, including temporary injunctions, removal and sale of fixtures, and closure of the premises for one year. (Pen. Code, § § 11227, 11230.)

The Red Light Abatement Law defines as a nuisance "[e]very building or place used for the purpose of illegal gambling as defined by state law or local ordinance,

lewdness, assignation, or prostitution . . . ." (Italics added.) Defendants maintain that the term "lewdness" does not include the exhibition of obscene magazines or films in bookstores or theaters. We agree.

The law was passed in 1913 and, as its name indicates, its primary purpose was to regulate ". . . houses of ill fame, . . . and other like places, where acts of lewdness and prostitution are habitually practiced and carried on as a business." (People v. Barbiere (1917) 33 Cal.App. 770, 775 [166 P. 812].) It has been held that the terms "lewdness, assignation, or prostitution" were "obviously" intended to refer to "illicit sexual acts or conduct amounting to or involving lewdness." (People v. Arcega (1920) 49 Cal.App. 239, 242 [193 P. 264].) The term "lewdness" is not synonymous with "prostitution" and has a broader significance, including "all other immoral or degenerate conduct or conversation between persons of opposite sexes, . . ." including the solicitation of sexual acts to be performed elsewhere. (People v. Bayside Land Co. (1920) 48 Cal.App. 257, 260 [191 P. 994].)

The consensus of more recent cases is that the term

"lewdness" is broad enough to include live lewd entertainment, such as stage shows or other exhibitions featuring obscene performances. (People ex rel. Hicks v. Sarong Gals (1972) 27 Cal.App.3d 46, 50 [103 Cal.Rptr. 414], subsequent opn., supra, 42 Cal.App.3d 556, 559; Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941, 944; Maita v. Whitmore (N.D.Cal. 1973) 365 F.Supp. 1331.) Yet no California case has yet held that the Red Light Abatement Law was intended to apply to the exhibition of obscene magazines or films. As stated in Harmer: "If the Legislature had desired or intended by section 11225 of the Penal Code to regulate the showing of pornographic films, pictures or drawings, such subject matter could have been included in section 11225 when it was recently amended in 1969, as it did when it chose to enumerate 'illegal gambling as defined by state law or local ordinance' in that section of the Penal Code." (23 Cal.App.3d at p. 944.) On the other hand, it has been forcefully contended that "it borders upon the absurd to apply the law to live stage shows and exhibitions that are lewd and to deny its application to motion pictures that are patently lewd and

obscene." (Id., at p. 952 [dis. opn.]; see also People ex rel. Hicks v. Sarong Gals, supra, 27 Cal.App.3d at p. 50.)

The courts of other states have generally agreed that "red light" laws do not apply to the exhibition of obscene books or films. (People v. Goldman (1972) 7 Ill.App.3d 253 [287 N.E.2d 177]; Gulf States Theaters of La., Inc. v. Richardson, supra, 287 So.2d 480; Southland Theatres, Inc. v. State ex rel. Tucker (1973) 254 Ark. 192 [492 S.W.2d 421]; State v. Morley, supra, 317 P.2d 317, 318-320; State ex rel. Cahalan v. Diversified Theat. (1975) 59 Mich.App. 223 [229 N.W.2d 389].)

Although the question is not free from doubt, in view of the history of the Red Light Abatement Law and the uniform interpretation given it by the courts of this state, we conclude that the act's provisions were not intended to apply, and do not apply, to the exhibition of obscene magazines or films.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Wright, C. J., and Sullivan, J., concurred.

MOSK, J., Concurring and dissenting--I concur in that part of the majority opinion which emphasizes that the closing of bookstores or theaters, either temporarily or permanently, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution. I would add that such proceedings also offend article I, section 2, of the California Constitution which prohibits action that may "restrain or abridge liberty of speech or press."

Other than the foregoing, I dissent and join with Justice Tobriner in his views.

CLARK, J., Concurring and dissenting--I concur in the judgment and the opinion of the court except insofar as the new opinion differs from the vacated opinion by substitution of the material at page 58, line 4 to page 59, line 34 in place of the following paragraph: "We express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin further 'obscene' exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such

further forms of relief would be appropriate and constitutionally permissible. (See People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App.3d 556, 562-563 [117 Cal.Rptr. 24]; Bloss v. Paris Township (1968) 380 Mich. 466 [157 N.W.2d 260]; Grove Press, Inc. v. Flask (N.D. Ohio 1970) 326 F.Supp. 574, 578-580; Oregon Bookmark Corporation v. Schrunk (D.Ore. 1970) 321 F.Supp. 639; State ex rel. Cahalan v. Diversified Theat. (1975) 59 Mich.App. 223 [229 N.W.2d 389, 396-397]; United Theaters of Fla., Inc. v. State ex rel. Gerstein (Fla.App. 1972) 259 So.2d 210, 212-213, vacated and remanded, 419 U.S. 1028 [42 L.Ed.2d 304, 95 S.Ct. 510].) Other cases have held that such relief would constitute an invalid prior restraint of presumptively protected materials (Gulf States Theatres of La., Inc. v. Richardson (La. 1973) 287 So.2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So.2d 883, 886-887; New Riviera Arts Theatre v. State (1967) 219 Tenn. 652 [412 S.W.2d 890, 893-895]; Sanders v. State (1974) 231 Ga. 608 [203 S.E.2d 153, 156-157]; State ex rel. Little Beaver Theatre, Inc. v. Tobin (Fla.App. 1972) 258 So.2d 30, 32; State ex rel. Ewing v. "Without A Stitch" (1974) 37 Ohio

St.2d 95 [66 Ohio Ops.2d 223, 307 N.E.2d 911, 917-918].) Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration."

McComb, J., concurred.

TOBRINER, J., Dissenting--The majority today empowers city attorneys to bring actions to abate the sale or display of purportedly obscene material as a public nuisance, even when such sale or display occurs wholly within the confines of an adult bookstore or theatre and thus in no way affects those members of the community who would find it offensive. By permitting a city attorney who objects to certain material to wield this remedy--a remedy designed for those rare cases where any delay would concretely imperil the public interest—the majority endangers freedom of expression to an extent never before contemplated in this state. Hereafter, the public's right to read books or magazines, to view plays or motion pictures, can be permanently curtailed if a city attorney

can find a single judge who believes the material is obscene. In light of the vagueness of the prevailing constitutional obscenity standard, and the subjective nature of the judgment that the application of that standard inevitably entails, the majority's sanction of censorship by a single judicial officer robs our free speech guarantees of their constitutionally-mandated protection.

As we shall point out, however, this case may be resolved on grounds other than that the Legislature exceeded constitutional bounds when it enacted the public nuisance laws; those laws simply do not confer upon the city attorney the power that the majority today bestows upon him. As drafted by the Legislature, the public nuisance laws provide an extraordinary remedy for situations that truly demand one; it is only as rewritten by the majority that these laws trench upon constitutional rights.

Courts of equity enjoy no roving commission to define public nuisances; they may abate only such nuisances as the Legislature declares. In People v. Lim (1941) 18 Cal.2d 872, 881 [118 P.2d 472], we acknowledged that "the responsibility for establishing those standards of public

morality, the violations of which are to constitute public nuisances within the equity's jurisdiction, should be left with the Legislature."[1] Our charge, consequently, is a limited one: We must ascertain whether the Legislature has declared that the conduct complained of in the present case constitutes a public nuisance.

It has not. The public nuisance statutes do not embrace conduct whose tangible effects are limited to a small group of consenting adults. A careful reading of the

[1]The judicial reluctance to proclaim new species of public nuisance is well founded. The remedy of abatement, fashioned as it was to equip the courts to deal expeditiously with serious perils to the public, denies the defendant many of the procedural safeguards he would enjoy if he were subjected to an ordinary civil or criminal action. "[I]t is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons equity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted." (People v. Lim, ante, 18 Cal.2d 872, 880 (citations omitted).)

statutes discloses that they govern only public nuisances--that is, only those nuisances that bear concretely upon the health or senses of a substantial number of people. The statutory language supports this conclusion in two ways.

First, only such indecent behavior as assults the senses of the community constitutes a public nuisance. The majority bases its contrary conclusion on section 370 of the Penal Code which defines a public nuisance to be anything "which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property . . . ." The majority argues that this language recognizes four classes of conduct that may constitute a public nuisance: conduct that is (a) injurious to health; (b) indecent; (c) offensive to the senses; or (d) an obstruction to property. Since indecency is a ground for finding a public nuisance quite apart from offense to the senses, the argument goes, the statute subsumes even private indecency which has no impact upon the senses of the community as a whole.

The majority's error is fundamental: it construes the wrong statute. Although sections 370-372 of the Penal

Code govern the criminal dimension of public nuisances, section 731 of the Code of Civil Procedure governs their abatement. That section provides that "[a] civil action may be brought . . . to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code . . . ." (Italics added.) Although the majority alludes to the "substantial identity" of the Penal Code and Civil Code definitions, I find them different in one pivotal respect.

Since section 3480 of the Civil Code merely provides that "a public nuisance is one which affects at the same time . . . any considerable number of persons," we must refer to the definition of nuisance set forth in the preceding section. Section 3479 of the Civil Code defines a nuisance to be anything "which is injurious to health, or is indecent or offensive to the senses, or an obstruction of the free use of property . . . ." (Italics added.) The difference between this definition and that contained in the Penal Code is subtle, but crucial. The phrase "to the senses" in section 370 of the Penal Code modifies only the word "offensive"; here, it modifies both indecent and

offensive. According to the Civil Code, therefore, indecent conduct is a public nuisance only when it is "indecent . . . to the senses" of a substantial number of people. Consequently, a court may not abate a public nuisance unless it assaults the senses, not merely the sensibilities or tastes, of the community.[2]

---

[2]This argument, admittedly, lets a great deal turn on the absence of a comma in Civil Code section 3479, but the majority lets an equal amount turn on the presence of a comma in section 370 of the Penal Code. Since the statute authorizing the abatement of nuisances explicitly refers to the Civil Code definitions, there can be no doubt that we are to construe the section that lacks the comma. It is quite likely, of course, that this difference in punctuation between the two sections is accidental, and that their drafters intended their scope to be coextensive. This court, consequently, might reasonably decide to interpret the sections identically, notwithstanding their different punctuation.

Which section, however, contains the error and which section is correct? It is difficult to ascertain the intent that motivated the Legislature when it enacted these statutes in 1872 and amended them in 1874; any conclusion that one rather than the other involved the error in punctuation, therefore, is fraught with uncertainty. Nonetheless, if we must choose which section is correct, we should honor the definition embodied in the Civil Code. The fact that section 731 of the Code of Civil Procedure refers to the Civil Code definitions gives some indication that those definitions comport with the Legislature's wishes. Moreover, the preferences for narrowly construing statutes that infringe first amendment values and

"footnote forwarded"

That the private sale or display of obscene material may not be abated as a public nuisance is thus manifest. Such materials do not impact "at the same time" on the senses of a "considerable number of people." (Civ. Code, § 3480.) The result would be different if the purportedly obscene materials were flaunted on a public billboard. In that event, the indecent behavior or object would simultaneously affect the senses of a large group. But where the purportedly indecent behavior occurs in private, the mere fact that even a large portion of the public disapproves of it fails to bring it within the purview of the public nuisance abatement statute.[3]

"footnote 2 continued"

for interpreting statutes in light of the consequences of the alternative constructions, see infra, conjoin to urge that we embrace the Civil Code definitions. These considerations, I grant, do not conclusively establish that the Civil Code definition accurately reflects the legislative intent; there are no reasons, however, to prefer the definition contained in the Penal Code.

[3]The majority insists that conduct that is indecent does not offend any of the five senses, and thus that the use of the word "indecent" in the statute establishes that the public nuisance laws encompass conduct that does not bear upon the senses. (Ante, at p. 50.) The answer is

"footnote continued"

The public nuisance statutes do not comprehend the private sale or display of obscenity for yet a second reason. The requirement that a public nuisance "interfere with the comfortable enjoyment of life or property" (Civ. Code, § 3479; Pen. Code, § 370) effectively excludes private behavior from the purview of the public nuisance statutes. In the present case, for example, the purportedly obscene exhibitions themselves in no way interfere with the comfortable enjoyment of life of those who do not enter the adult book stores or theatres; the materials do not obtrude upon those who never see them. Consequently, the necessity that the nuisance interfere with the comfortable enjoyment of life infuses both the Penal and Civil Codes with the requirement of public behavior that the phrase "indecent . . . to the senses" independently imports to the latter.

It might be argued that although the obscene

"footnote 3 continued"

simple: even though conduct that is indecent does its damage to the sensibilities or tastes, rather that the senses, of the public, it falls within the public nuisance statute only when perceived by the senses of a substantial number of people.

materials themselves do not affect the lives of those who do not view them, the knowledge that there are stores or theatres that sell or display such materials does interfere with the comfortable enjoyment of life of a considerable number of people. So attenuated a discomfort, however, is far too meager to command the protection of the public nuisance statutes. There is no hint in the statutes or the cases construing them that conduct can constitute a public nuisance simply because some people stand philosophically opposed to it; the courts have demanded that conduct impinge more concretely upon a substantial number of people before branding it a public nuisance.

In People v. Robin (1943) 56 Cal.App.2d 885, 889 [133 P.2d 436], the court held that "the unlawful sale of liquor, of itself, . . . does not constitute a nuisance within the terms of sections 3479, Civil Code . . . ." Since violating the laws regulating the sale of liquor is presumably as indecent as violating the laws regulating the sale of obscene material, the court implicitly ruled that the mere fact that certain behavior runs afoul of society's preferences—even as articulated in its criminal laws--con-

stitutes an inadequate basis for holding it a public nuisance.

In People v. Seccombe (1930) 103 Cal.App. 306 [284 P. 725], the court declined to abate the practice of usury as a public nuisance. It observed: "It is very evident that if following the despicable calling of usurer constitutes a public nuisance [as defined in Civil Code section 3479] it must be because such conduct constitutes 'an obstruction the the free use of property' . . . . It could not by any stretch of the imagination be considered as covered by any other clause of the code definition." (103 Cal.App. at p. 310.) (Italics added.) The court's language left scant doubt that it thought that engaging in "the despicable calling of usurer' smacked of indecency. Nonetheless, it expressly ruled that that practice could not qualify as a nuisance on the grounds that it was indecent or offensive to the senses of a large number of people.

In Dean v. Powell Undertaking Co. (1921) 55 Cal.App. 545 [203 P. 1015], the court refused to abate the operation of a funeral parlor in a residential neighborhood as a public nuisance. The plaintiffs had complained that the

operation of such an establishment precluded the comfortable enjoyment of life for many residents who were squeamish about the proximity of dead bodies. The court explained that the plaintiffs deserved relief only if they could establish that the funeral parlor omitted [sic] noxious odors or otherwise afflicted the senses of the aggrieved parties, and that merely offending the sensibilities of some people would not render it a public nuisance. The Dean court quoted with approval the language of the New Jersey Court of Chancery in Wescott v. Middleton (1887) 43 N.J. Eq. 478, 486 [11 A. 490]: "In this case, then, we have the broad, yet perfectly perceptible or tangible ground or principle announced that the injury must be physical as distinguished from one purely imaginative; it must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or refined fancy . . . ."

The Court of Appeal most recently addressed this issue in Harmer v. Tonylyn Productions Inc. (1972) 23 Cal.App.3d 941 [100 Cal.Rptr. 576, 50 A.L.R.3d 959], in which private citizens brought an action pursuant to

section 3493 of the Civil Code to enjoin the showing of a purportedly obscene film as a public nuisance. As the majority notes, Harmer ruled that the plaintiffs had not alleged the special damages that section 3493 requires of private citizens who would bring an action to abate a public nuisance. In so holding, however, the court explicitly rejected the contention that the statutory language embraced such a private exhibition.

The Harmer court observed: "The film involved was shown only in a closed theatre. . . . Thus, only those members of the community were exposed to the film who voluntarily chose to see it. This is not a case where the community as a whole is forced to submit involuntarily to vile odors or air pollution or to the unwelcome presence of animals. In the statute's terms, the alleged nuisance at bench did not '. . . affect[s] at the same time an entire community or neighborhood, . . .' (Civ. Code, § 3480) (italics added)." (Citations omitted.) The court thus squarely rejected the notion that the mere existence of an establishment that deals in obscene materials constitutes a public nuisance, for if private indecent behavior fell

within the public nuisance statute, the entire community would have been affected in Harmer.

The majority contends that Harmer improperly analyzed the character of the state interest in regulating the exhibition of obscene matter; it observed that Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49 [37 L.Ed.2d 446, 93 S.Ct. 2628] and People v. Luros (1971) 4 Cal.3d 84 [92 Cal.Rptr. 833, 480 P.2d 633], both recognize a legitimate state interest in regulating the distribution of obscene material to consenting adults. But those decisions merely testify to the outer limits of constitutional state regulation; they do not testify to the actual ambit of California's public nuisance laws. Harmer correctly construed the California statutes. The majority cannot rebut that construction by merely noting that, under prevailing constitutional doctrine, the Legislature stands empowered to draft more expansive statutes.

In support of its conclusion that the public nuisance statute comprehend private indecent behavior, the majority relies primarily upon Weis v. Superior Court (1916) 30 Cal.App. 730 [159 P. 464], which involved the indecent

exposure of women in an exhibit at the 1915 Panama-California International Exposition. In a three-and-one-half-page opinion the court ruled that it could abate the exhibition as a public nuisance in order to subserve the public morals and protect "men, women, and children attending this public resort as spectators from being subjected to witnessing the offensive and indecent exhibition." (30 Cal.App. at p. 733.)

Weis constitutes meager support for the expansion of the public nuisance statutes that the majority today effects. It is not at all clear that spectators were adequately forewarned of the character of the exhibition involved in Weis. Although the exhibition's name might have given some hint of its nature, spectators could reasonably have assumed that the "Sultan's Harem" involved something less than actual nudity. Nor is there any indication that the manager of the exhibit attempted to convey its content to possible spectators by making it an "adults only" attraction; the court explicitly referred to the need to protect children from the exhibition. To the extent that Weis involved subjecting an unadmonished

audience to indecent material, it has no bearing on the present case in which the allegedly indecent material was displayed exclusively within the confines of an "adults only" establishment.

The majority also attempts to cull support from People v. Lim, supra, 18 Cal.2d 872, which, it maintains, "approves the reasoning" of Weis. (Ante, at p. 50.) As noted above, however, it is not at all clear that the reasoning or the holding of Weis extends to truly private conduct. Lim itself did not involve indecency or obscenity, but a gambling establishment which, the complaint alleged, " 'draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property.' " We held simply that "[c]rowds of disorderly people who disturb the peace and obstruct the traffic may well impair the free enjoyment of life and property and give rise to the hazards designated in the statute." (18

Cal.2d at p. 882.) Needless to say, the concrete interference with the public peace in Lim is quite distinct from the private behavior involved in the present case.

A careful study of the statutes and the cases thus impels the conclusion that the public nuisance statutes do not govern indecent conduct when such conduct is not thrust upon those who find it repugnant. The potent remedy of abatement is reserved for objects and behavior that concretely interfere with the enjoyment of life of a considerable number of people; to the extent that private indecent behavior offends the sensibilities of members of the community, they must rely on their public officials to enforce any apposite criminal laws.

Recent expressions of legislative and popular will reinforce my conclusion that the public nuisance statutes do not govern private conduct. As explained above, Harmer v. Tonylyn Productions, Inc., ante, 23 Cal.App.3d 941, ruled that California's public nuisance statutes did not embrace the sale or display of obscene material under circumstances in which such materials are exposed only to willing viewers. Following Harmer, several attempts were

made legislatively to overrule the decision; the voters and legislators of this state rebuffed each attempt to establish public nuisance abatement procedures directed at obscenity.

In the 1972 general election, the electorate rejected by a vote of about two to one an initiative measure that would have endowed the district attorney of any county with the authority to maintain an action for an injunction in superior court to prevent the display or sale of obscene material.[4] In June 1974, the Assembly Committee on

---

[4]The relevant portions of the initiative (Proposition 19) read:

"CHAPTER 7.9. INJUNCTIVE RELIEF

"313.50. The superior courts of the State of California have jurisdiction to enjoin the sale or distribution of any book, magazine, or any other publication or article, or the public showing of any motion picture film, slide, exhibit, or performance which is prohibited under Chapters 7.5, 7.6, 7.7 or 7.8 of this title.

"313.51. The district attorney of any county in this state in which a person, firm, or corporation sells or distributes, or is about to sell or distribute, or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing, photograph, or other publication or matter which is prohibited by the above enumerated chapters may maintain an action for an

"footnote forwarded"

Criminal Justice defeated similar provisions in Assembly

"footnote 4 continued"

injunction against such person, firm, or corporation in the superior court to prevent the sale or further sale or the distribution or further distribution of any such prohibited publication or articles.

"313.52. The district attorney of any county in this state in which a person, firm, or corporation shows publicly, or is about to show publicly, or is about to acquire possession with intent to show publicly any motion picture film, slide, exhibit, or performance which is prohibited under the above enumerated chapters may maintain an action for an injunction against such person, firm, or corporation in the superior court to prevent the public showing or further public showing of such prohibited matter or activity.

"313.53. The person, firm, or corporation sought to be enjoined is entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days after the conclusion of the trial.

"313.54. In the event that an order or judgment be entered in favor of the district attorney and against the person, firm, or corporation sought to be enjoined, such final order or judgment shall contain a provision directing the person, firm, or corporation to surrender to such peace officer as the court may direct or to the sheriff of the county in which the action was brought any of the matter described in Section 313.51 or 313.52, and such sheriff or officer shall be directed to seize and destroy the same, provided that destruction of such matter shall be stayed until after the time provided for filing a notice of appeal has expired, and provided further that where an appeal is timely filed, such destruction shall be stayed pending the decision on appeal."

Proposition 19 was defeated by a vote of 5,503,888 (67.9 percent) No to 2,603,927 (32.1 percent) Yes. Secretary of State, Statement of Vote, General Election November 7, 1972, page 30.

Bill No. 4340.[5]

In light of the Harmer decision, and the subsequent rejection of proposed legislation which would have specifically authorized a nuisance abatement procedure to be

---

[5]The relevant portions read:
"311.3(a) The superior court has jurisdiction to enjoin the sale, distribution or exhibition of obscene books, articles or films, as hereinafter specified:

"(1) The district attorney, county counsel, city attorney or city prosecutor of any county, city or town, in which a person, firm or corporation sells, distributes or exhibits or is about to sell, distribute or exhibit or has in his possession with intent to sell, distribute or exhibit any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, film, figure, image or any written or printed matter of an indecent character which is obscene as defined in Section 311, may maintain an action for an injunction against such person, firm or corporation in the superior court to prevent the sale or further sale or further distribution or the exhibition or further exhibition of such matter.

"(2) The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within 14 days after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

"(b) In the event that a final order or judgment of injunction be entered in favor of such officer of the county, city or town and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff or any other law enforcement agency of the county in which the action was brought any of the matter described in paragraph (1) hereof and such sheriff or law enforcement agency shall be directed to seize and destroy the same or to hold the same as evidence."

used against obscenity, traditional canons of statutory construction teach that the existing nuisance provisions should not be judicially extended to encompass the display of allegedly obscene material to willing viewers. " 'Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approved of it. [Citations.]' (People v. Hallner, 43 Cal.2d 715, 719 [277 P.2d 393]; People v. Courtney, 176 Cal.App.2d 731, 741 [1 Cal.Rptr. 789].) This rule is not rendered inapplicable by the fact that the determinative decision is rendered by a Court of Appeal." (People v. Orser (1973) 31 Cal.App.3d 528, 533-534, fn. 4 [107 Cal.Rptr. 458].)

Properly construed, the public nuisance statutes do not embrace private indecency such as involved in the present case. Our inquiry would normally end here. Given the majority's conclusion that these statutes do encompass such private behavior, however, it becomes necessary to assay them by constitutional standards. As construed by the majority, the public nuisance statutes fail to pass

constitutional muster for several reasons.

First, the statutes, as interpreted today, contravene the First Amendment because they chill protected expression. As I have explained in detail elsewhere, the concept of obscenity is an inherently vague one, and no legislative or judicial efforts that even arguably comport with the First Amendment could define the term with sufficient precision to enable businesspersons confidently to determine whether their products or exhibitions would be ruled obscene. (Bloom v. Municipal Court (1976) 16 Cal.3d 71 [127 Cal.Rptr. 317, 545 P.2d 229] (Tobriner, J., dissenting).) The problem of defining obscenity is intractable because we have no community view of that which appeals to the prurient interest and lacks social value, but rather a host of distinct views within each community. And even if these distinct views could be said metaphysically to coalesce to form some community standard, no trier of fact could confidently ascertain what that standard was.

The determination that an exhibition is obscene, consequently, amounts to nothing more than a testament to subjective preferences or a conjecture about the taste

and fancy of one's neighbors. As the Court of Appeal acknowledged in In re Davis (1966) 242 Cal.App.2d 645, 661 [51 Cal.Rptr. 702], when it held a law proscribing "any act which openly outrages public decency" impermissibly vague, "[t]he constitution . . . could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury . . . ."

Although we do not deal here with a criminal law, the vice of vagueness remains fatal. The United States Supreme Court explained: "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech and of the press suffer." (Ashton v. Kentucky (1966) 384 U.S. 195, 200 [16 L.Ed.2d 469, 473, 86 S.Ct. 1407].)

Moreover, the vagueness and subjectivity of present obscenity doctrine impose particularly severe burdens on freedom of expression if, as the majority holds, obscenity doctrine maybe imported into public nuisance proceedings.

In Bloom v. Municipal Court (1976) 16 Cal.3d 71 [127 Cal.Rptr. 317, 545 P.2d 229], a majority of this court incorporated into the definition of obscenity in section 311 of the Penal Code the guidelines set forth in Miller v. California (1973) 413 U.S. 15 [37 L.Ed.2d 419, 93 S.Ct. 2607]. Central to the Miller test is whether "the average person, applying contemporary community standards" would find that the involved expression appeals to the prurient interest. If this constitutional "test" can be consistently applied at all, and I have already expressed my serious doubts that it can, it seems clear that a jury, as a microcosm of the community, is the only "trier of fact" fit to conduct the inquiry contemplated by Miller.

In a public nuisance proceeding, however, no jury is impanelled to determine whether a particular work is obscene under contemporary community standards; that crucial determination--upon which the censorship of a book, a magazine, a play or a motion picture turns--is left instead to a single judicial officer. In a criminal obscenity proceeding, the requirement that a jury be drawn from a cross-section of the community will normally provide at

least some promise that the varying tastes and sensibilities that exist in every community will play some role in the determination of whether a work is obscene or not. By authorizing a single judge--distant to the interplay of the diverse cultural, religious, intellectual and economic backgrounds commonly present in a jury room--to make the determination of obscenity on the basis of an undeniably subjective standard, the majority inevitably confines constitutional protection only to those works that, in the personal view of a single judge, are not offensive.[6]

Nearly 20 years ago, in Butler v. Michigan (1957) 352 U.S. 380 [1 L.Ed.2d 412, 77 S.Ct. 524], the United States

---

[6]Although a trial court's determination of obscenity is subject to appellate review, numerous commentators have pointed out that in light of the subjective nature of the Miller standards, "[d]irect appellate review of findings of prurient appeal and patent offensiveness becomes impossible." (Note, Community Standards, Class Actions and Obscenity Under Miller v. California (1975) 88 Harv. L.Rev. 1838, 1844; see, e.g., Hunsaker, The 1973 Obscenity-Pornography Decisions: Analysis, Impact and Legislative Alternatives (1974) 11 San Diego L.Rev. 906, 931, fn. 124; The Supreme Court, 1972 Term (1973) 87 Harv.L.Rev. 1, 168-169.)

Supreme Court overturned a state obscenity statute that prohibited the dissemination of any book that the state believed was unfit for children. Justice Frankfurter, writing for a unanimous court, declared: "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig. . . . The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." (352 U.S. at p. 383 [1 L.Ed.2d at p. 414].)

In like manner, the "incidence" of the decision of the majority in this case is to reduce the adult population of California to reading only those books that do not offend the sensibilities of the most "sensitive" trial judge in their community. Surely such a procedure robs free speech of the stringent protection guaranteed by our most cherished constitutional precepts.[7]

---

[7]The majority circumvents another constitutional

"footnote forwarded"

In sum, California's public nuisance statutes simply were not drafted for the purpose to which the majority commits them. The sword of public nuisance is a blunt one, admirably designed to curb noxious odors or to quell riots, but ill suited to the delicate sphere of the First Amendment where legal overkill is fatal.

Because the public nuisance statutes do not govern the willful viewing of obscene material in private by adults—and because if they did they would be constitutionally defective—I conclude that the trial court properly sustained the defendant's demurrer. Accordingly, I would affirm the decision below.

Mosk. J., concurred.

"footnote 7 continued"

problem inherent in its approach by importing to the public nuisance statutes a requriement of a prior adversary hearing. The majority justifies this judicial rewriting of the statute by referring to the principle that laws should be construed so as to uphold their validity. There is, however, an alternative way to construe the statutes involved in this case so as to render them immune to constitutional attack: they can be interpreted as inapplicable to private behavior. Given that the applicability of the statute's language to private behavior is, at best, highly dubious, this reading would seem the more judicious way to construe the statute so as to uphold its validity.

APPENDIX C

[L.A. No. 30432. In Bank. Mar. 4, 1976.]

*THE PEOPLE ex rel. JOSEPH P. BUSCH, as District Attorney, etc. et al., Plaintiffs and Appellants, v. PROJECTION ROOM THEATER et al., Defendants and Respondents. (And 4 other cases.)**

OPINION

RICHARDSON, J.--In these consolidated cases we consider whether or not a civil action brought by law enforcement officers to restrain the exhibition of obscene books and films states a cause of action for relief under the public nuisance laws of this state. Plaintiffs, who are law enforcement officers acting on behalf of both the City and the County of Los Angeles, seek injunctive and other relief against defendants who, according to the five separate complaints filed herein, operate book stores or motion picture theaters in Los Angeles which exhibit magazines or films that are obscene under the laws of this

*These cases were previously entitled Busch v. Projection Room Theater, etc.

**People ex rel. Busch v. Stan's Books (L.A. No. 30433); People ex rel. Busch v. Book Bin (L.A. 30434); People ex rel. Busch v. Jason's Books (L.A. No. 304350· People ex rel. Busch v. Galaxy Book Store (L.A. No. 30436).

state. While the five complaints are directed at different defendants and vary somewhat in the specifics of their allegations, the causes of action alleged in each are sufficiently similar in the facts alleged and in the charging allegations to permit us to consider them together.

For convenience we examine the pleadings in the case involving Projection Room Theater finding that our conclusions in that action are dispositive of the issues raised in all of the actions. Plaintiffs assert that defendants' operations constitute public nuisances which are subject to regulation and abatement either pursuant to the general public nuisance statutes (Civ. Code, § § 3479, 3480; Pen. Code, § § 370, 371), or under the Red Light Abatement Law (Pen. Code, § 11225 et seq.). Defendants dispute the contention. We will conclude that although the Red Light Abatement Law was not intended to apply to the exhibition of obscene magazines or films, nevertheless the complaint herein does state a cause of action under the general public nuisance statutes.

The complaint herein alleges the following facts:

Defendants own or operate specified premises in Los Angeles County in which acts of "lewdness" are taking place, namely, the "past and continuing exhibition" of magazines and films "all of which are lewd and obscene under the laws of this State, and therefore did and do constitute a nuisance under the laws of this State. . . ." It is further alleged that the magazines and films so exhibited by defendants have, as their dominant theme, an "appeal to the prurient interest in sex," that they are "patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters," and that they are "utterly without social value. . . ."

According to the complaint, the maintenance of these premises constitutes a public nuisance which will continue unless restrained and enjoined. Plaintiffs attached to the complaint numerous exhibits consisting of police reports summarizing the obscene nature of the magazines and films exhibited by defendants. The complaint sought multiple relief including: (1) preliminary injunction restraining defendants from conducting and maintaining the

premises for the purposes described above; (2) abatement of the premises as a public nuisance under sections 11230-11231 of the Penal Code (Red Light Abatement Law); (3) permanent injunction against defendants and their agents, officers and employees from operating the premises as a public nuisance; (4) closure of the premises for one year; (5) removal and sale of the fixtures and movable property thereon used in conducting the nuisance; (6) use of the proceeds from the sale to pay fees and costs in connection with the closure; and (7) other appropriate relief.

Defendants filed general demurrers to each complaint, asserting that plaintiffs failed to state a cause of action either under the public nuisance statutes or the Red Light Abatement Law. The trial court considering itself bound by the decision in Harmer v. Tonylyn Productions, Inc. (1972) 23 Cal.App.3d 941 [100 Cal.Rptr. 576, 50 A.L.R.3d 959], sustained the demurrers without leave to amend and entered judgments of dismissal. Plaintiffs appeal.

The scope of our inquiry herein is considerably narrowed by application of the familiar rule,

acknowledged by defendants, that "a general demurrer admits the truth of all material factual allegations in the complaint" (Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal.3d 493, 496 [86 Cal.Rptr. 88, 468 P.2d 216]), and we may accordingly assume that all materials in question, both magazines and films, are obscene within the meaning of Penal Code section 311, as alleged.

1. Public Nuisance Statutes

We first consider whether or not the allegations of the complaint, summarized above, sufficiently describe the existence of a public nuisance and note preliminarily the substantial identity of definitions appearing in Penal Code sections 370 and 371, and Civil Code sections 3479 and 3480, taken in conjunction. Section 370 of the Penal Code defines a public nuisance as "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, . . ." (Italics added.) When analyzed, section 370 reveals the following: the

proscribed act may be anything which alternatively is injurious to health or is indecent or offensive to the senses; the results of the act must interfere with the comfortable enjoyment of life or property; and those affected by the act may be an entire neighborhood or a considerable number of persons, and as amplified by Penal Code section 371 the extent of the annoyance or damage on the affected individuals may be unequal.

Is the exhibition of obscene magazines and films a form of activity which may be characterized as "indecent" or "offensive to the senses" interfering with the comfortable enjoyment of life of a "considerable number of persons" within the contemplation of Penal Code section 370? We conclude that such exhibitions may fairly be deemed such conduct, and we find convincing support for such conclusion from applicable cases in this and other jurisdictions.

In Weis v. Superior Court (1916) 30 Cal.App. 730 [159 P. 464], the Court of Appeal ruled that an attraction known as the "Sultan's Harem," conducted at the Panama-

California International Exposition, constituted a public nuisance subject to abatement. This exhibition assertedly involved the "indecent and offensive" exposure to members of the public of the "naked persons and private parts thereof" of various female employees. Although such conduct also constituted the crime of indecent exposure (Pen. Code, § 311), nevertheless the Weis court held that "[w]here, however, the threatened acts, if committed, in addition to being an indictable offense, will constitute a public nuisance, courts of equity are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the maintenance thereof. [Citation.]" (Weis at p. 732.) Furthermore, the court, quoting from Wood on Nuisances (§ 68), stated that " 'A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious . . . and disorderly members of society.' " (Ibid., italics added.)

The foregoing Weis reasoning was approved by us more than 30 years ago in People v. Lim (1941) 18 Cal.2d 872, 879 [118 P.2d 472]. Lim involved the propriety of an injunction against gambling activities on the ground that they constituted a public nuisance. We upheld in Lim the use of the public nuisance injunctive remedy against gambling activity which, it was alleged, disturbed the public peace and corrupted public morals. In Lim we carefully traced the history of public nuisance actions and noted that "The courts have . . . refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance." (P. 879.) Although, as we noted, such activities as gambling or usury do not fit comfortably within the above quoted statutory definition of public nuisance, in Lim we acknowledged that an "indecent" exhibition such as was involved in Weis could be enjoined despite the concurrent application of the criminal statutes, since such exhibitions if determined to be indecent are expressly declared by section 370 to be public nuisances.

While carefully noting that Weis involved live dance performances, we discern no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and "live" performances on the other. The presentation of either may fairly be described as "indecent" and equally injurious to public morals.

Defendants have insisted that only those activities may constitute public nuisances which are offensive to the five senses of hearing, sight, touch, smell, and taste. It is claimed that public nuisance and abuse of the five senses is coextensive. Defendants in so arguing focus only upon that category of nuisances described in Penal Code section 370 and Civil Code section 3479 as conduct which is "offensive to the senses." The contention is erroneous for such reasoning completely ignores the additional language appearing in both sections which explicitly includes as an alternative class of public nuisance conduct "anything which is indecent." When the question is put, which of the five senses is offended by conduct that is "indecent," it becomes readily apparent both that the

thesis of the argument does not fit the legislative language and that conduct offensive to a community's moral sensibilities is likewise subject to regulation under section 370. Thus, the court in Weis, supra, at page 733, unequivocally states that " . . . any act which is an offense against public decency, or any public exhibition which is offensive to the senses whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance." (Italics added.)

The trial court herein, in sustaining defendants' demurrers without leave to amend, considered itself controlled by the holding in Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941 (hg. den.). Harmer is distinguishable, however, since it involved an action by private citizens to enjoin a particular film being shown at the premises in question. The Harmer court ruled that plaintiff had failed to allege the necessary special damages requisite to bringing a public nuisance action (see Civ. Code, § 3493) thus casting doubt upon his status as a litigant. In contrast, the instant action is brought by

public officials acting on behalf of the public generally and proceeding under provisions (see Code Civ. Proc., § 731) which expressly confer standing upon them.

More fundamentally, however, Harmer fails properly to analyze the nature of the state's interests in regulating the exhibition of obscene matter. Harmer suggests that since "only those members of the community were exposed to the film who voluntarily chose to see it," therefore "[t]he nuisance was not one which is inflicted or imposed on the public." (Harmer at p. 943.) Such reasoning frequently advanced and variously stated, misses the point. The fact that obscene or other indecent exhibitions take place behind closed doors and are viewed only by those who choose to view them does not defeat the community's interest in regulating such exhibitions.

Substantially identical arguments were advanced and rejected by us recently in People v. Luros (1971) 4 Cal.3d 84 [92 Cal.Rptr. 833, 480 P.2d 633], and by the United States Supreme Court in Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49 [37 L.Ed.2d 446, 93 S.Ct. 2628]. In both Luros and Paris, the argument was made that the state

had no legitimate interest in regulating the exhibition and distribution of obscene matter to consenting adults. Defendants in each case urged that Stanley v. Georgia (1969) 394 U.S. 557 [22 L.Ed.2d 542, 89 S.Ct. 1243], was controlling on this point. Stanley, however, held only that private possession of obscene matter cannot constitutionally be made a crime. In Luros, we carefully noted the important distinction, recognized by the federal Supreme Court in Stanley, between commercial distribution of obscenity and the private possession thereof. We concluded that " . . . in the context of public distribution of obscenity, the balance of interests upholds the constitutionality of state regulation, even though that regulation imposes some burdens upon the exercise of constitutional rights. [¶] . . . States retain broad power to regulate obscenity and regulation of the public distribution of obscenity falls well within the broad scope of that power." (4 Cal.3d at pp. 92-93.) We reaffirm the foregoing conclusion reached by us in Luros.

Similarly, Paris (decided after Harmer was filed) rejected the extension of Stanley to situations involving

consenting adults. The high court specifically addressed the Harmer limitation on the scope of the public interest, and "categorically disapprove[d] the theory, . . . that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only." (413 U.S. at p. 57 [37 L.Ed.2d at p. 456]; see also pp. 57-69 [37 L.Ed.2d at pp. 456-464].) The court noted that "[t]he States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodations, as long as these regulations do not run afoul of specific constitutional prohibitions. [Citations.]" (Id. at p. 57 [37 L.Ed.2d at p. 457].) These "legitimate interests" include "the interest of the public in the quality of life and the total community environment; the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime." (Fn. omitted; id., at p. 58 [37 L.Ed.2d at p. 457], italics added.) Further,

"[a] though there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist." (Id., at pp. 60-61 [37 L.Ed.2d at p. 459].)

Following its rejection of the argument that Stanley forbids state regulation of the exhibition or distribution of obscene matter, the Paris court very significantly observed: "Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' 'right . . . to maintain a decent society.' [Citation.]" (Italics added;

Paris at pp. 68-69 [37 L.Ed.2d at pp. 463-464].) Both Luros and Paris explain and confirm that the interests of those who voluntarily view and purchase obscene materials are not necessarily coextensive with the interests of the community at large.

Even more recently the United States Supreme Court has noted that a state's public nuisance action seeking to close a theater exhibiting obscene films constituted an effort "to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." (Fn. omitted; Huffman v. Pursue, Ltd. (1975) 420 U.S. 592, 605 [43 L.Ed.2d 482, 492, 95 S.Ct. 1200].)

Thus, the Paris court has clearly held that states may constitutionally determine that public exhibition of obscene material has a tendency to injure the community or to jeopardize the maintenance of a decent society. In Luros we confirmed the validity of state regulation of the commercial distribution of obscene materials. The legislative definition of a public nuisance includes "[a] nything which is . . . indecent, or offensive to the senses, . . . so as

to interfere with the comfortable enjoyment of life or property by an . . . community or neighborhood, or . . . any considerable number of persons . . . ." (Pen. Code, § 370.) California's public nuisance definition, including as it does indecency, comports fully with the state's power to regulate as recently declared both by the federal Supreme Court and by ourselves and fortifies our conclusion that public nuisance laws may properly be employed to regulate the exhibition of obscene material to "consenting adults."

Given the legitimate state interests in controlling the exhibition of obscenity, carefully outlined in Paris, it is not surprising that a wide variety of cases, both before and after Paris, have confirmed that such exhibitions constitute nuisances which properly may be abated by the courts. (Grove Press, Inc. v. Flask (N.D. Ohio 1970) 326 F.Supp. 574, vacated and remanded on other grounds, 413 U.S. 902 [37 L.Ed.2d 1013, 93 S.Ct. 3026]; Bloss v. Paris Township (1968) 380 Mich. 466 [157 N.W.2d 260, 261]; Cactus Corporation v. State ex rel. Murphy (1971) 14 Ariz.App. 38 [480 P.2d 375]: Evans Theatre Corporation

v. Slaton (1971) 227 Ga. 377 [180 S.E.2d 712], cert. den., 404 U.S. 950 [30 L.Ed.2d 267, 92 S.Ct. 281]; New Rivieria Arts Theatre v. State (1967) 219 Tenn. 652 [412 S.W.2d 890, 893-895]; Sanders v. State (1974) 231 Ga. 608 [203 S.E.2d 153, 156-157]: State ex rel. Ewing v. "Without A Stitch" (1974) 37 Ohio St.2d 95 [66 Ohio Ops.2d 223, 307 N.E.2d 911], app. dism., 421 U.S. 923 [44 L.Ed.2d 82, 95 S.Ct. 1649]; State ex rel. Keating v. Vixen (1971) 27 Ohio St.2d 278 [56 Ohio Ops.2d 165, 272 N.E.2d 137], vacated and remanded on other grounds, 413 U.S. 905 [37 L.Ed.2d 1016, 93 S.Ct. 3033], opn. on remand, 35 Ohio St.2d 215 [64 Ohio Ops.2d 366, 301 N.E.2d 880]; State ex rel. Little Beaver Theatre, Inc. v. Tobin (Fla.App. 1972) 258 So.2d 30, 31-32; State v. Morley (1957) 63 N.M. 267 [3]7 P.2d 317, 318-319].)

Each of the above cases either expressly or implicitly recognizes that the exhibition of obscene magazines or films constitutes a public nuisance properly subject to abatement. For example, the Georgia Supreme Court in Evans upheld application of a general public nuisance statute to an allegedly obscene film, "I Am Curious

(Yellow)." The court explained that "[i]f any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.... The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film." (180 S.E.2d at pp. 715-716.)

Evans was cited and discussed with approval in Paris, supra, 413 U.S. 49, 54-55 [37 L.Ed.2d 446, 454-456], wherein the court expressly approved use of public nuisance actions to enjoin the exhibition of obscene materials. Since this portion of Paris is critical to our analysis, we quote it in its entirety:

"Georgia case law permits a civil injunction of the exhibition of obscene materials. [Citations, including Evans, supra.] While this procedure is civil in nature, and

does not directly involve the state criminal statute proscribing exhibition of obscene material, the Georgia case law permitting civil injunction does adopt the definition of 'obscene materials' used by the criminal statute. Today, in Miller v. California, supra, we have sought to clarify the constitutional definition of obscene material subject to regulation by the States, and we vacate and remand this case for reconsideration in light of Miller.

"This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation. [Citation.] Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that

the materials were constitutionally unprotected. Thus the standards of [prior United States Supreme Court decisions] were met." (Italics added; Paris at pp. 54-55 [37 L.Ed.2d at pp. 455-456].)

Similarly, as we explain hereinafter, the California public nuisance statutes must be enforced in such a way as to operate in a constitutional fashion. So applied, as the foregoing cases make clear, there is no overriding principle of law which precludes the states from regulating the exhibition of obscene matter by application of their public nuisance statutes. To this extent, Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941, is disapproved.

We do not suggest, of course, that law enforcement officers in each city and county in this state have a mandatory duty always and everywhere to abate the exhibition of obscene matter within their borders. The particular nature of the exhibition, and its effect upon the community, may vary considerably in time and place. Law enforcement officers accordingly are vested with wide discretion to decide whether or not to initiate the

kind of formal abatement proceedings such as those instituted in the matters before us. (See Code Civ. Proc., § 731.) Once a community through its public officials has determined that a particular display of obscene materials amounts to a public nuisance which is injurious to the safety and morals of that community, no valid reason exists why, adequate constitutional procedural safeguards being met, the remedy of civil abatement proceedings must be denied such community. The availability of the public nuisance procedure may prove useful for those local entities which, determining that they are confronted with commercial exploitation of obscene materials resulting in the conditions contemplated in section 370, elect to use it.

We consider and will reject several constitutional objections raised by defendants.

Defendants first suggest that the statutory language "indecent, or offensive to the senses" (Pen. Code, § 370) is impermissibly vague, requiring them to guess as to its meaning, and thus is violative of the First Amendment to the federal Constitution. Several cases involving similar

language have avoided the constitutional problem by construing such language as synonymous with the word "obscene," as defined in the applicable statutes and case law. (See In re Giannini (1968) 69 Cal.2d 563, 571, fn. 4 [72 Cal.Rptr. 655, 446 P.2d 535] ["lewd or dissolute conduct"]; Silva v. Municipal Court (1974) 40 Cal.App.3d 733, 736-737 [115 Cal.Rptr. 479] [same]; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578 ["lewd, indecent, lascivious or obscene"]; Janus Films, Inc. v. City of Fort Worth (Tex.Civ.App. 1962) 354 S.W.2d 597, 600 ["indecent"]; State ex rel. Ewing v. "Without A Stitch," supra, 307 N.E.2d 911, 914-915 ["obscene" construed in light of recent United States Supreme Court opinions; State ex rel Cahalan v. Diversified Theat. (1975) 59 Mich.App. 223 [229 N.W.2d 389 393-394] ["Lewdness"].

Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts. "If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,'

or 'immoral' as used to describe regulated material [in federal statutes], we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California . . . ." (Italics added; United States v. 12 200-Ft. Reels of Film (1973) 413 U.S. 123, 130, fn. 7 [37 L.Ed.2d 500, 507, 93 S.Ct. 2665]; accord, Hamling v. United States (1974) 418 U.S. 87, 114 [41 L.Ed.2d 590, 618-619, 94 S.Ct. 2887].) Indeed, in Bloom v. Municipal Court (1976) 13 Cal.3d 71, ___ [___ Cal.Rptr. ___, ___ P.2d ___], we have construed our own obscenity statute (Pen. Code, § 311, subd. (a) ["obscene matter"]) as referring to the patently offensive matter set forth in Miller, supra, and have rejected the contention that the statute is unconstitutionally vague. (Accord, People v. Enskat (1973) 33 Cal.App.3d 900 [109 Cal.Rptr. 433].) We find no impediment to use of the remedy on grounds of statutory vagueness.

Defendants next assert that use of the public nuisance statutes to enjoin or otherwise abate the exhibition

of films or magazines violates the constitutional principle against prior restraint of presumptively protected materials. (See Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 558 [43 L.Ed.2d 448, 459, 95 S.Ct. 1239]; United States v. Thirty-seven Photographs (1971) 402 U.S. 363, 367 [28 L.Ed.2d 822, 828, 91 S.Ct. 1400]; Freedman v. Maryland (1965) 380 U.S. 51, 58 [13 L.Ed.2d 649, 654, 85 S.Ct. 734]; Kingsley Books, Inc. v. Brown (1957) 354 U.S. 436 [1 L.Ed.2d 1469, 77 S.Ct. 1325].) We note preliminarily that, as the foregoing cases make clear, prior restraints are not unconstitutional per se; a prior restraint may avoid constitutional infirmity if it occurs " 'under procedural safeguards designed to obviate the dangers of a censorship system.' " (Southeastern Promotions, Ltd., supra, at p. 559 [43 L.Ed.2d at p. 460].) Among other safeguards, "a prompt final judicial determination must be assured." (Id., at p. 560 [43 L.Ed.2d at p. 460].)

In order properly to evaluate defendants' prior restraint contention, we first review the possible forms of relief available to plaintiffs in an ordinary public nuisance action. The public nuisance statutes, unlike the Red

Light Abatement Law, do not provide for such specific forms of relief as temporary and perpetual injunction (Pen. Code, §§ 11226-11227), removal and sale of fixtures, and closure of the premises for one year (Pen. Code, § 11230). Instead, the district attorney or city attorney is, in general terms, empowered to bring a civil action to "abate" the public nuisance. (Code Civ. Proc., § 731.) Further, " 'An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case. . . .' " (Italics added; Guttinger v. Calaveras Cement Co. (1951) 105 Cal.App.2d 382, 390 [233 P.2d 914]; see generally McQuillin, Municipal Corporations, § 24.73.)

Thus, in the matters before us if the trial court finds the subject matter obscene under prevailing law an injunctive order may be fashioned that is "proper and suitable" in each case. It is entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing. (Paris Adult Theatre I v. Slaton, supra, 413 U.S. 49, 54-55

[37 L.Ed.2d 446, 454-455] [approving Georgia abatement procedure]; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 579; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; State ex rel. Ewing v. "Without A Stitch," supra, 307 N.E.2d 911, 914; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Keating v. Vixen, supra, 272 N.E.2d 137; see Commonwealth v. Guild Theatre, Inc. (1968) 432 Pa. 378 [248 A.2d 45]; Grove Press Inc. v. City of Philadelphia (3d Cir. 1969) 418 F.2d 82, 90-91; Sanders v. State, supra, 203 S.E.2d 153, 156-157.) The relevant principle derived from the foregoing cases is that, except in extremely limited situations (see United States v. Thirty-seven Photographs, supra, 402 U.S. 363), no injunctive relief, whether temporary or permanent in nature, may be afforded until defendant has been given a full and fair judicial hearing on the issue of obscenity, and an opportunity to obtain prompt judicial review of that issue by the state appellate courts.

We express no opinion upon the further question whether the court may, in addition, either close the

premises entirely or enjoin further "obscene" exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible. (See People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App.3d 556, 562-563 [117 Cal.Rptr. 24]; Bloss v. Paris Township, supra, 157 N.W.2d 260; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578-580; Oregon Bookmark Corporation v. Schrunk (D.Ore. 1970) 321 F.Supp. 639; State ex rel. Cahalan v. Diversified Theat., supra, 229 N.W.2d 389, 396-397; United Theaters of Fla., Inc. v. State ex rel. Gerstein (Fla.App. 1972) 259 So.2d 210, 212-213, vacated and remanded, 419 U.S. 1028 [42 L.Ed.2d 304, 95 S.Ct. 510].) Other cases have held that such relief would constitute an invalid prior restraint of presumptively protected materials (Gulf States Theatres of La., Inc. v. Richardson (La. 1973) 287 So.2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So.2d 883, 886-887; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; Sanders v. State, supra, 203 S.E.2d 153, 156-157; State ex

rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Ewing v. "Without A Stitch," supra, 307 N.E.2d 911, 917-918.) Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration.

Defendants finally maintain that since the public nuisance statutes are silent with respect ot prior adversary hearings, this court should not undertake to "rewrite" those statutes to require such hearings. Such a contention lacks merit. We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145 [109 Cal.Rptr. 897, 514 P.2d 697]; In re Kay (1970) 1 Cal.3d 930, 941-942 [83 Cal.Rptr. 686, 464 P.2d 142].) Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions. (State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 31-32; see United States v. Thirty-seven Photographs, supra, 402 U.S. 363,

367-373 [28 L.Ed.2d 822, 828-832].) As hereinabove expressed, abatement of a nuisance is accomplished by means of a "proper and suitable" injunction. In the context of assertedly obscene magazines and films, a "roper" injunction ordinarily is one that is issued after the requisite adversary hearing has taken place.

We emphasize that the proceedings now before us remain at the pleading stage. Having determined that plaintiffs' complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise dimensions of the injunctive and other relief which might be suitable in this and the related cases. It is enough that the parties and the trial court recognize that substantial constitutional issues are presented in this litigation, and that care must be exercised to assure that defendants' constitutional rights are not infringed. More than this is not required.

2. Red Light Abatement Law

As an alternative theory of relief, plaintiffs allege that defendants' exhibition of obscene magazines and

films constitutes a nuisance subject to abatement under the provisions of the Red Light Abatement Law (Pen. Code, § 11225 et seq.). We have previously noted that these provisions prescribe certain specific forms of relief not available under the general nuisance statutes, including temporary injunctions, removal and sale of fixtures, and closure of the premises for one year. (Pen. Code, § § 11227, 11230.)

The Red Light Abatement Law defines as a nuisance "[e]very building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution . . . ." (Italics added.) Defendants maintain that the term "lewdness" does not include the exhibition of obscene magazines or films in bookstores or theaters. We agree.

The law was passed in 1913 and, as its name indicates, its primary purpose was to regulate " . . . houses of ill fame, . . . and other like places, where acts of lewdness and prostitution are habitually practiced and carried on as a business." (People v. Barbiere (1917) 33 Cal.App. 770, 775 [166 P. 812].) It has been held that the terms

"lewdness, assignation, or prostitution" were "obviously" intended to refer to "illicit sexual acts or conduct amounting to or involving lewdness." (People v. Arcega (1920) 49 Cal.App. 239, 242 [193 P. 264].) The term "lewdness" is not synonymous with "prostitution" and has a broader significance, including "all other immoral or degenerate conduct or conversation between persons of opposite sexes, . . ." including the solicitation of sexual acts to be performed elsewhere. (People v. Bayside Land Co. (1920) 48 Cal.App. 257, 260 [191 P. 994].)

The consensus of more recent cases is that the term "lewdness" is broad enough to include live lewd entertainment, such as stage shows or other exhibitions featuring obscene performances. (People ex rel. Hicks v. Sarong Gals (1972) 27 Cal.App.3d 46, 50 [103 Cal.Rptr. 414], subsequent opn., supra, 42 Cal.App.3d 556, 559; Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941, 944; Maita v. Whitmore (N.D.Cal. 1973) 365 F.Supp. 1331.) Yet no California case has yet held that the Red Light Abatement Law was intended to apply to the exhibition of obscene magazines or films. As stated in Harmer: "If the

Legislature had desired or intended by section 11225 of the Penal Code to regulate the showing of pornographic films, pictures or drawings, such subject matter could have been included in section 11225 when it was recently amended in 1969, as it did when it chose to enumerate 'illegal gambling as defined by state law or local ordinance' in that section of the Penal Code." (23 Cal.App.3d at p. 944.) On the other hand, it has been forcefully contended that "it borders upon the absurd to apply the law to live stage shows and exhibitions that are lewd and to deny its application to motion pictures that are patently lewd and obscene." (Id., at p. 952 [dis. opn.]; see also People ex rel. Hicks v. Sarong Gals, supra, 27 Cal.App.3d at p. 50.)

The courts of other states have generally agreed that "red light" laws do not apply to the exhibition of obscene books or films. (People v. Goldman (1972) 7 Ill.App.3d 253 [287 N.E.2d 177]; Gulf States Theaters of La., Inc. v. Richardson, supra, 287 So.2d 480; Southland Theatres, Inc. v. State ex rel. Tucker (1973) 254 Ark. 192 [492 S.W.2d 421]; State v. Morley, supra, 317 P.2d 317, 318-320. On the other hand, the most recent case on the point holds that

the term "lewdness" in Michigan's "red light" act is broad enough to include the exhibition of films which are obscene under the standards set forth in Miller v. California, supra, 413 U.S. 15, 25 [37 L.Ed.2d 419, 431, 93 S.Ct. 2607]. (State ex rel. Cahalan v. Diversified Theat., supra, 229 N.W.2d 389, 393.)

Although the question is not free from doubt, in view of the history of the Red Light Abatement Law and the uniform interpretation given it by the courts of this state, we conclude that the act's provisions were not intended to apply, and do not apply, to the exhibition of obscene magazines or films.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

McComb, J., Sullivan, J., and Clark, J., concurred.

TOBRINER, J.--The majority today empowers city attorneys to bring actions to abate the sale or display of purportedly obscene material as a public nuisance, even when such sale or display occurs wholly within the confines of an adult bookstore or theatre and thus in no

way afflicts those members of the community who would find it offensive. By permitting a city attorney who objects to certain material to wield this drastic remedy--a remedy designed for those rare cases where any delay would concretely imperil the public interest--the majority endangers freedom of expression to an extent never before contemplated in this state. The owner of every bookstore, market, drugstore, airport, or other business place which sells "Playboy," "Playgirl," or similar publications must henceforth labor beneath the Damocles sword of public nuisance: if a city attorney decides that a single picture in one of those magazines is obscene, and so convinces a single judge, the owner may be compelled to close his place of business or to discontinue the sale of materials that have never been judged obscene.

This court could not, without abdicating its responsibility to secure the rights provided by the federal and state Constitutions, sanction a legislative decision to endow a city attorney with so onerous and clumsy a weapon in his attempt to purge the private viewing of exhibitions he deemed "indecent." The vagueness of the

prescribed conduct and the prior restraint on First Amendment activity would render such a law doubly vulnerable to constitutional challenge.

As we shall point out, however, this case may be resolved on grounds other than that the Legislature exceeded constitutional bounds when it enacted the public nuisance laws; those laws simply do not confer upon the city attorney the power that the majority today bestows upon him. As drafted by the Legislature, the public nuisance laws provide an extraordinary remedy for situations that truly demand one; it is only as rewritten by the majority that these laws trench upon constitutional rights.

Courts of equity enjoy no roving commission to define public nuisances; they may abate only such nuisances as the Legislature declares. In People v. Lim (1941) 18 Cal.2d 872, 881 [118 P.2d 472], we acknowledged that "the responsibility for establishing those standards of public morality, the violations of which are to constitute public nuisances within the equity's jurisdiction, should be left

with the Legislature."[1] Our charge, consequently, is a

---

[1]The judicial reluctance to proclaim new species of public nuisance is well founded. The remedy of abatement, fashioned as it was to equip the courts to deal expeditiously with serious perils to the public, denies the defendant many of the procedural safeguards he would enjoy if he were subjected to an ordinary civil or criminal action. "[I]t is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons equity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted." (People v. Lim, ante, 18 Cal.2d 872, 880 (citations omitted).)

That the majority opinion denudes the defendants of their rights to have a jury determine whether the exhibitions are actually obscene proves particularly distressing. In Bloom v. Municipal Court (1976) 13 Cal.3d 71 [___ Cal.Rptr. ___, ___ P.2d ___], a majority of this court incorporated into the definition of obscenity in section 311 of the Penal Code the guidelines set forth in Miller v. California (1972) 413 U.S. 15 [37 L.Ed 2d 419, 93 S.Ct. 2607]. Central to the Miller test is whether "the average person, applying contemporary community standards" would find that the work appeals to the prurient interest. The jury, as a microcosm of the community, is the only vehicle fit to conduct that inquiry.

limited one: We must ascertain whether the Legislature has declared that the conduct complained of in the present case constitutes a public nuisance.

It has not. The public nuisance statutes do not embrace conduct whose tangible effects are limited to a small group of consenting adults. A careful reading of the statutes discloses that they govern only public nuisances--that is, only those nuisances that bear concretely upon the health or senses of a substantial number of people. The statutory language supports this conclusion in two ways.

First, only such indecent behavior as assaults the senses of the community constitutes a public nuisance. The majority bases its contrary conclusion on section 370 of the Penal Code which defines a public nuisance to be anything "which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property . . . ." The majority argues that this language recognizes four classes of conduct that may constitute a public nuisance: conduct that is (a) injurious to health; (b) indecent; (c) offensive to the senses; or (d) an obstruction to property. Since indecency is a ground for finding a

public nuisance quite apart from offense to the senses, the argument goes, the statute subsumes even private indecency which has no impact upon the senses of the community as a whole.

The majority's error is fundamental: it construes the wrong statute. Although sections 370-372 of the Penal Code govern the criminal dimension of public nuisances, section 731 of the Code of Civil Procedure governs their abatement. That section provides that "[a] civil action may be brought . . . to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code . . . ." (Italics added.) Although the majority alludes to the "substantial identity" of the Penal Code and Civil Code definitions, I find them different in one pivotal respect.

Since section 3480 of the Civil Code merely provides that "a public nuisance is one which affects at the same time . . . any considerable number of persons," we must refer to the definition of nuisance set forth in the preceding section. Section 3479 of the Civil Code defines a nuisance to be anything "which is injurious to health, or

is indecent or offensive to the senses, or an obstruction of the free use of property . . . ." (Italics added.) The difference between this definition and that contained in the Penal Code is subtle, but crucial. The phrase "to the senses" in section 370 of the Penal Code modifies only the word "offensive"; here, it modifies both indecent and offensive. According to the Civil Code, therefore, indecent conduct is a public nuisance only when it is "indecent . . . to the senses" of a substantial number of people. Consequently, a court may not abate a public nuisance unless it assaults the senses, not merely the sensibilities or tastes, of the community.[2]

---

[2]This argument, admittedly, lets a great deal turn on the absence of a comma in Civil Code section 3479, but the majority lets an equal amount turn on the presence of a comma in section 370 of the Penal Code. Since the statute authorizing the abatement of nuisances explicitly refers to the Civil Code definitions, there can be no doubt that we are to construe the section that lacks the comma. It is quite likely, of course, that this difference in punctuation between the two sections is accidental, and that their drafters intended their scope to be coextensive. This court, consequently, might reasonably decide to interpret the sections identically, notwithstanding their different punctuation.

"footnote forwarded"

That the private sale or display of obscene material may not be abated as a public nuisance is thus manifest. Such materials do not impact "at the same time" on the senses of a "considerable number of people." (Civ. Code, § 3480.) The result would be different if the purportedly obscene materials were flaunted on a public billboard. In that event, the indecent behavior or object would simultaneously affect the senses of a large group. But where the purportedly indecent behavior occurs in private, the

"footnote 2 continued"

Which section, however, contains the error and which section is correct? It is difficult to ascertain the intent that motivated the Legislature when it enacted these statutes in 1872 and amended them in 1874; any conclusion that one rather than the other involved the error in punctuation, therefore, is fraught with uncertainty. Nonetheless, if we must choose which section is correct, we should honor the definition embodied in the Civil Code. The fact that section 731 of the Code of Civil Procedure refers to the Civil Code definitions gives some indication that those definitions comport with the Legislature's wishes. Moreover, the preferences for narrowly construing statutes that infringe first amendment values and for interpreting statutes in light of the consequences of the alternative constructions, see infra, conjoin to urge that we embrace the Civil Code definitions. These considerations, I grant, do not conclusively establish that the Civil Code definition accurately reflects the legislative intent; there are no reasons, however, to prefer the definition contained in the Penal Code.

mere fact that even a large portion of the public disapproves of it fails to bring it within the purview of the public nuisance abatement statute.[3]

The public nuisance statutes do not comprehend the private sale or display of obscenity for yet a second reason. The requirement that a public nuisance "interfere with the comfortable enjoyment of life or property" (Civ. Code, § 3479; Pen. Code, § 370) effectively excludes private behavior from the purview of the public nuisance statutes. In the present case, for example, the purportedly obscene exhibitions themselves in no way interfere with the comfortable enjoyment of life of those who do not enter the adult book stores or theatres; the materials do not obtrude upon those who never see them. Consequently, the necessity that the nuisance interfere

[3]The majority insists that conduct that is indecent does not offend any of the five senses, and thus that the use of the word "indecent" in the statute establishes that the public nuisance laws encompass conduct that does not bear upon the senses. (Ante, at p. 368.) The answer is simple: even though conduct that is indecent does its damage to the sensibilities or tastes, rather that the senses, of the public, it falls within the public nuisance statute only when perceived by the senses of a substantial number of people.

with the comfortable enjoyment of life infuses both the Penal and Civil Codes with the requirement of public behavior that the phrase "indecent... to the senses" independently imports to the latter.

It might be argued that although the obscene materials themselves do not affect the lives of those who do not view them, the knowledge that there are stores or theatres that sell or display such materials does interfere with the comfortable enjoyment of life of a considerable number of people. So attenuated a discomfort, however, is far too meager to command the protection of the public nuisance statutes. There is no hint in the statutes or the cases construing them that conduct can constitute a public nuisance simply because some people stand philosophically opposed to it; the courts have demanded that conduct impinge more concretely upon a substantial number of people before branding it a public nuisance.

In People v. Robin (1943) 56 Cal.App.2d 885, 889 [133 P.2d 436], the court held that "the unlawful sale of liquor, of itself, ... does not constitute a nuisance within the terms of sections 3479, Civil Code...." Since violating

the laws regulating the sale of liquor is presumably as indecent as violating the laws regulating the sale of obscene material, the court implicitly ruled that the mere fact that certain behavior runs afoul of society's preferences--even as articulated in its criminal laws--constitutes an inadequate basis for holding it a public nuisance.

In People v. Seccombe (1930) 103 Cal.App. 306 [284 P. 725], the court declined to abate the practice of usury as a public nuisance. It observed: "It is very evident that if following the despicable calling of usurer constitutes a public nuisance [as defined in Civil Code section 3479] it must be because such conduct constitutes 'an obstruction to the free use of property'.... It could not by any stretch of the imagination be considered as covered by any other clause of the code definition." (103 Cal.App. at p. 310.) (Italics added.) The court's language left scant doubt that it thought that engaging in "the despicable calling of usurer" smacked of indecency. Nonetheless, it expressly ruled that that practice could not qualify as a nuisance on the grounds that it was indecent or offensive to the senses of a large number of people.

In Dean v. Powell Undertaking Co. (1921) 55 Cal.App. 545 [203 P. 1015], the court refused to abate the operation of a funeral parlor in a residential neighborhood as a public nuisance. The plaintiffs had complained that the operation of such an establishment precluded the comfortable enjoyment of life for many residents who were squeamish about the proximity of dead bodies. The court explained that the plaintiffs deserved relief only if they could establish that the funeral parlor omitted [sic] noxious odors or otherwise afflicted the senses of the aggrieved parties, and that merely offending the sensibilities of some people would not render it a public nuisance. The Dean court quoted with approval the language of the New Jersey Court of Chancery in Wescott v. Middleton (1887) 43 N.J. Eq. 478, 486 [11 A. 490]: "In this case, then, we have the broad, yet perfectly perceptible or tangible ground or principle announced that the injury must be physical as distinguished from one purely imaginative; it must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or refined fancy . . . ."

The Court of Appeal most recently addressed this issue in Harmer v. Tonylyn Productions Inc. (1972) 23 Cal.App.3d 941 [100 Cal.Rptr. 576, 50 A.L.R.3d 959], in which private citizens brought an action pursuant to section 3493 of the Civil Code to enjoin the showing of a purportedly obscene film as a public nuisance. As the majority notes, Harmer ruled that the plaintiffs had not alleged the special damages that section 3493 requires of private citizens who would bring an action to abate a public nuisance. In so holding, however, the court explicitly rejected the contention that the statutory language embraced such a private exhibition.

The Harmer court observed: "The film involved was shown only in a closed theatre. . . . Thus, only those members of the community were exposed to the film who voluntarily chose to see it. This is not a case where the community as a whole is forced to submit involuntarily to vile odors or air pollution or to the unwelcome presence of animals. In the statute's terms, the alleged nuisance at bench did not '. . . affect[s] at the same time an entire community or neighborhood, . . .' (Civ. Code, § 3480)

(italics added)." (Citations omitted.) The court thus squarely rejected the notion that the mere existence of an establishment that deals in obscene materials constitutes a public nuisance, for if private indecent behavior fell within the public nuisance statute, the entire community would have been affected in Harmer.

The majority contends that Harmer improperly analyzed the character of the state interest in regulating the exhibition of obscene matter; it observed that Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49 [37 L.Ed.2d 446, 93 S.Ct. 2628] and People v. Luros (1971) 4 Cal.3d 84 [92 Cal.Rptr. 833, 480 P.2d 633], both recognize a legitimate state interest in regulating the distribution of obscene material to consenting adults. But those decisions merely testify to the outer limits of constitutional state regulation; they do not testify to the actual ambit of California's public nuisance laws. Harmer correctly construed the California statutes. The majority cannot rebut that construction by merely noting that, under prevailing constitutional doctrine, the Legislature stands empowered to draft more expansive statutes.

In support of its conclusion that the public nuisance statute comprehend private indecent behavior, the majority relies primarily upon Weis v. Superior Court (1916) 30 Cal.App. 730 [159 P. 464], which involved the indecent exposure of women in an exhibit at the 1915 Panama-California International Exposition. In a three-and-one-half-page opinion the court ruled that it could abate the exhibition as a public nuisance in order to subserve the public morals and protect "men, women, and children attending this public resort as spectators from being subjected to witnessing the offensive and indecent exhibition." (30 Cal.App. at p. 733.)

Weis constitutes meager support for the expansion of the public nuisance statutes that the majority today effects. It is not at all clear that spectators were adequately forewarned of the character of the exhibition involved in Weis. Although the exhibition's name might have given some hint of its nature, spectators could reasonably have assumed that the "Sultan's Harem" involved something less than actual nudity. Nor is there any indication that the manager of the exhibit attempted

to convey its content to possible spectators by making it an "adults only" attraction; the court explicitly referred to the need to protect children from the exhibition. To the extent that Weis involved subjecting an unadmonished audience to indecent material, it has no bearing on the present case in which the allegedly indecent material was displayed exclusively within the confines of an "adults only" establishment.

The majority also attempts to cull support from People v. Lim, supra, 18 Cal.2d 872, which, it maintains, "approves the reasoning" of Weis. (Ante, at p. 367.) As noted above, however, it is not at all clear that the reasoning or the holding of Weis extends to truly private conduct. Lim itself did not involve indecency or obscenity, but a gambling establishment which, the complaint alleged, " 'draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property.' " We held simply

that "[c]rowds of disorderly people who disturb the peace and obstruct the traffic may well impair the free enjoyment of life and property and give rise to the hazards designated in the statute." (18 Cal.2d at p. 882.) Needless to say, the concrete interference with the public peace in Lim is quite distinct from the private behavior involved in the present case.

A careful study of the statutes and the cases thus impels the conclusion that the public nuisance statutes do not govern indecent conduct when such conduct is not thrust upon those who find it repugnant. The potent remedy of abatement is reserved for objects and behavior that concretely interfere with the enjoyment of life of a considerable number of people; to the extent that private indecent behavior offends the sensibilities of members of the community, they must rely on their public officials to enforce any apposite criminal laws.

Recent expressions of legislative and popular will reinforce my conclusion that the public nuisance statutes do not govern private conduct. As explained above, Harmer v. Tonylyn Productions, Inc., ante, 23 Cal.App.3d

941, ruled that California's public nuisance statutes did not embrace the sale or display of obscene material under circumstances in which such materials are exposed only to willing viewers. Following Harmer, several attempts were made legislatively to overrule the decision; the voters and legislators of this state rebuffed each attempt to establish public nuisance abatement procedures directed at obscenity.

In the 1972 general election, the electorate rejected by a vote of about two to one an initiative measure that would have endowed the district attorney of any county with the authority to maintain an action for an injunction in superior court to prevent the display or sale of obscene material.[4] In June 1974, the Assembly Committee on

---

[4]The relevant portions of the initiative (Proposition 19) read:

"CHAPTER 7.9. INJUNCTIVE RELIEF

"313.50. The superior courts of the State of California have jurisdiction to enjoin the sale or distribution of any book, magazine, or any other publication or article, or the public showing of any motion picture film, slide, exhibit, or performance which is prohibited under Chapters 7.5, 7.6, 7.7 or 7.8 of this title.

"footnote forwarded"

Criminal Justice defeated similar provisions in Assembly

"footnote 4 continued"

"313.51. The district attorney of any county in this state in which a person, firm, or corporation sells or distributes, or is about to sell or distribute, or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing, photograph, or other publication or matter which is prohibited by the above enumerated chapters may maintain an action for an injunction against such person, firm, or corporation in the superior court to prevent the sale or further sale or the distribution or further distribution of any such prohibited publication or articles.

"313.52. The district attorney of any county in this state in which a person, firm, or corporation shows publicly, or is about to show publicly, or is about to acquire possession with intent to show publicly any motion picture film, slide, exhibit, or performance which is prohibited under the above enumerated chapters may maintain an action for an injunction against such person, firm, or corporation in the superior court to prevent the public showing or further public showing of such prohibited matter or activity.

"313.53. The person, firm, or corporation sought to be enjoined is entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days after the conclusion of the trial.

"313.54. In the event that an order or judgment be entered in favor of the district attorney and against the person, firm, or corporation sought to be enjoined, such final order or judgment shall contain a provision directing the person, firm, or corporation to surrender to such peace officer as the court may direct or to the sheriff of the county in which the action was brought any of the matter described in Section 313.51 or 313.52, and such

"footnote forwarded"

Bill No. 4340.[5]

"footnote 4 continued"

sheriff or officer shall be directed to seize and destroy the same, provided that destruction of such matter shall be stayed until after the time provided for filing a notice of appeal has expired, and provided further that where an appeal is timely filed, such destruction shall be stayed pending the decision on appeal."

Proposition 19 was defeated by a vote of 5,503,888 (67.9 percent) No to 2,603,927 (32.1 percent) Yes. Secretary of State, Statement of Vote, General Election November 7, 1972, page 30.

[5]The relevant portions read:
"311.3(a) The superior court has jurisdiction to enjoin the sale, distribution or exhibition of obscene books, articles or films, as hereinafter specified:

"(1) The district attorney, county counsel, city attorney or city prosecutor of any county, city or town, in which a person, firm or corporation sells, distributes or exhibits or is about to sell, distribute or exhibit or has in his possession with intent to sell, distribute or exhibit any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, film, figure, image or any written or printed matter of an indecent character which is obscene as defined in Section 311, may maintain an action for an injunction against such person, firm or corporation in the superior court to prevent the sale or further sale or further distribution or the exhibition or further exhibition of such matter.

"(2) The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within 14 days after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

"footnote forwarded"

In light of the Harmer decision, and the subsequent rejection of proposed legislation which would have specifically authorized a nuisance abatement procedure to be used against obscenity, traditional canons of statutory construction teach that the existing nuisance provisions should not be judicially extended to encompass the display of allegedly obscene material to willing viewers. " 'Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approved of it. [Citations.]' (People v. Hallner, 43 Cal.2d 715, 719 [277 P.2d 393]; People v. Courtney, 176 Cal.App.2d 731, 741 [1 Cal.Rptr. 789].) This rule is not rendered inapplicable by the fact

"footnote 5 continued"

"(b) In the event that a final order or judgment of injunction be entered in favor of such officer of the county, city or town and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff or any other law enforcement agency of the county in which the action was brought any of the matter described in paragraph (1) hereof and such sheriff or law enforcement agency shall be directed to seize and destroy the same or to hold the same as evidence."

that the determinative decision is rendered by a Court of Appeal." (People v. Orser (1973) 31 Cal.App.3d 528, 533-534, fn. 4 [107 Cal.Rptr. 458].)

Properly construed, the public nuisance statutes do not embrace private indecency such as involved in the present case. Our inquiry would normally end here. Given the majority's conclusion that these statutes do encompass such private behavior, however, it becomes necessary to assay them by constitutional standards. As construed by the majority, the public nuisance statutes fail to pass constitutional muster for several reasons.

First, the statutes, as interpreted today, contravene the First Amendment because they chill protected expression. As I have explained in detail elsewhere, the concept of obscenity is an inherently vague one, and no legislative or judicial efforts that even arguably comport with the First Amendment could define the term with sufficient precision to enable businesspersons confidently to determine whether their products or exhibitions would be ruled obscene. (Bloom v. Municipal Court (1976) 13 Cal.3d 71 [___ Cal.Rptr. ___, ___ P.2d ___] (Tobriner, J., dis-

senting).) The problem of defining obscenity is intractable because we have no community view of that which appeals to the prurient interest and lacks social value, but rather a host of distinct views within each community. And even if these distinct views could be said to metaphysically coalesce to form some community standard, no trier of fact could confidently ascertain what that standard was.

The determination by a judge or juror that an exhibition is obscene, consequently, amounts to nothing more than a testament to his subjective preferences or a conjecture about the taste and fancy of his neighbors. As the Court of Appeal acknowledged in In re Davis (1966) 242 Cal.App.2d 645, 661 [51 Cal.Rptr. 702], when it held a law proscribing "any act which openly outrages public decency" impermissibly vague, " '[t]he constitution . . . could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury . . . .' "

Although we do not deal here with a criminal law, the vice of vagueness remains fatal. The United States Supreme Court explained: "Vague laws in any area suffer

a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."

Vague criminal laws chill protected expression because some people, reluctant to risk criminal penalties, refuse to deal with any materials or engage in any expression that might be deemed unprotected by the First Amendment. The use of the public nuisance laws to regulate obscenity will also entail the suppression of protected materials because of the awesome risks associated with being branded a public nuisance. The majority empowers the trial court to decide whether it should "close the premises entirely or enjoin further 'obscene' exhibitions regarding materials not yet adjudged obscene." A prudent business person is not likely to exhibit material that he thought was protected by the First Amendment when, if a particular judge disagreed with him,[6] he might

---

[6]The fact that the public nuisance statutes relegate the decision to a judge, rather than to a jury, exacerbates

"footnote forwarded"

have to endure not merely the suppression of that particular material, but the closing of his place of business.

The spectre of the application of these severe remedies, when combined with the inherent uncertainty as to that which constitutes obscenity, will thus entail a genre of private censorship as repugnant to the values underlying the First Amendment as censorship by the state itself. It will "tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." (Smith v. California (1959) 361 U.S. 147, 153-154 [4 L.Ed.2d

---

"footnote 6 continued"

the chilling effect. A dealer in protected material who might have been confident that no group of 12 jurors would unanimously conclude that his material offended the community standards might find himself inhibited by the greater uncertainty of how a single member of the community--the judge--would react to it.

205, 211, 80 S.Ct. 215].) Any law that attempts to regulate the exhibition or sale of obscene material to consenting adults will necessarily beget this noxious private censorship to some degree.

The public nuisance laws, as enlarged by the majority, suffer from a second constitutional infirmity: they constitute an illegal prior restraint of expression. In the present case, the plaintiffs entreat the trial court not only to enjoin the sale or exhibition of materials actually adjudged obscene, but to forbid the sale or exhibition of other materials prior to any determination that they are obscene. Moreover, they urge the trial court to close down a business--and thereby suppress all materials that the business would have sold or exhibited--if the court finds that the business has in the past sold or exhibited some obscene material. The majority, by refusing to foreclose these remedies, sanctions the subversion of a cardinal tenent of First Amendment doctrine: materials are presumptively protected by the First Amendment and their sale or exhibition will not ordinarily be suppressed prior to a final determination that, in fact, they are

unprotected.

Although the United States Supreme Court has never declared prior restraints unconstitutional per se, it has acknowledged that a system of prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity." (Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 70 [9 L.Ed.2d 584, 593, 83 S.Ct. 631].) As that high court has explained: "The presumption against prior restraints is heavier--and the degree of protection broader--than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 558-559 [43 L.Ed.2d 448, 459, 95 S.Ct. 1239].)

That prior restraints are antithetical to the values

embodied in the First Amendment is rendered clear by the facts of one of the cases decided today, People ex rel. Busch v. Jason's Books. The bookstore involved sells thousands of books and magazines, and the plaintiffs only allege that 30 percent of the books and 20 percent of the magazines are "hardcore." Presumably, 70 percent of the books and 80 percent of the magazines are not obscene and, therefore, are protected by the First Amendment. Yet the majority would permit a trial court to close down the entire bookstore and thereby suppress the bulk of the publications sold there, notwithstanding the fact that no one alleges that they are obscene. And even if the trial court judiciously refrains from closing the bookstore entirely, the majority permits it to enjoin the sale of particular books or magazines prior to any pronouncement upon their obscenity or social worth.

Because prior restraints critically endanger free expression, they will survive constitutional scrutiny only when they occur " 'under procedural safeguards designed to obviate the dangers of a censorship system.' " (Southeastern Promotions, Ltd., supra, at p. 559 [43 L.Ed.2d at

pp. 459-460].) In Southeastern Promotions, the court reaffirmed its ruling in Freedman v. Maryland (1965) 380 U.S. 51, 58 [13 L.Ed.2d 649, 654, 85 S.Ct. 734], that a prior restraint on expression is constitutionally defective unless it is "imposed only for a specified brief period and only for the purpose of preserving the status quo" pending a final judicial pronouncement on the materials' obscenity. (420 U.S. at p. 560 [43 L.Ed.2d at p. 460].) The public nuisance laws provide no such guarantees.

In the present cases the complaints urged the court to close the premises for one year. While the time period is specified, it cannot reasonably be deemed brief. Moreover, the request for such relief is not based upon the need to preserve the status quo pending adjudication of the obscenity of the other materials. Indeed, as I observed above, there is absolutely no allegation that certain of the materials that would be suppressed are obscene. And even if the trial court enjoined the sale of only those materials that were allegedly obscene, there is no guarantee of the prompt final judicial determination of obscenity that the federal cases require. In sum, prior

restraints such as the plaintiffs seek and the majority permits are blatantly unconstitutional because they are unaccompanied by those specific procedural safeguards that the United States Supreme Court has held necessary to overcome the presumed illegality of prior restraints.[7]

That the public nuisance statutes do not provide such procedural safeguards should not be suprising. As I have argued above, they simply were not drafted for the purpose to which the majority commits them. The sword of public nuisance is a blunt one, admirably designed to curb noxious odors or to quell riots, but ill suited to the delicate sphere of the First Amendment where legal overkill is fatal.

Because the public nuisance statutes do not govern

---

[7]The majority circumvents another procedural problem by importing to the statutes a requirement of a prior adversary hearing. The majority justifies this judicial rewriting of the statute by referring to the principle that laws should be construed so as to uphold their validity. There is, however, an alternative way to construe the statutes involved in this case so as to render them immune to constitutional attack: they can be interpreted as inapplicable to private behavior. Given that the applicability of the statute's language to private behavior is, at best, highly dubious, this reading would seem the more judicious way to construe the statute so as to uphold its validity.

the willful viewing of obscene material in private by adults—and because if they did they would be constitutionally defective—I conclude that the trial court properly sustained the defendant's demurrer. Accordingly, I would affirm the decision below.

Wright, C. J. and Mosk, J., concurred.

APPENDIX D

(Facsimile)

[Civ. No. 44184, Second Dist., Div. Three. Dec. 27, 1974.]

JOSEPH P. BUSCH, as District Attorney, etc, et al.,
Plaintiffs and Appellants, v.
PROJECTION ROOM THEATRE et al.,
Defendants and Respondents.

[And 4 other cases.] *

OPINION

POTTER, J.—In these consolidated appeals plaintiffs, the District Attorney of Los Angeles County and the City Attorney of the City of Los Angeles, attack judgments of dismissal in five separate civil actions brought by them seeking injunctive and other relief designed to stop the continued operation of five so-called "adult" book stores and "adult" theatre establishments. Since the judgments of dismissal were in each case based upon orders sustaining, without leave to amend, general demurrers on the ground that the complaints failed to state facts sufficient to constitute a cause of action, the allegations in each of the complaints must be accepted as true.

---

* Busch v. Stan's Books (Civ. No. 44185); Busch v. Book Bin (Civ. No. 44186); Busch v. Galaxy Book Store (Civ. No. 43610); Busch v. Jason's Books (Civ. No. 44187).

According to the complaints, the five places of business described therein were being operated by the defendants "for the purpose of lewdness."[1] All the complaints followed a single form, and alleged that "[h]eretofore and prior to the filing of this complaint acts of lewdness have taken place in and upon said premises and are now taking place therein and thereon." In each case, however, the complaint specified "[t]hat said lewdness consists of past and continuing exhibition of motion picture films and magazines"[2] at the business establishment in question. The complaints in each case continued by alleging that all of such motion pictures and magazines "are lewd and obscene under the laws of this State." In this respect it was specified that (a) the dominant theme of the films and magazines, "taken as a whole, appeals to the prurient interest in sex," (b) that such "films and

[1]Some of each group of defendants were alleged to be directly conducting such businesses; with respect to the others, it was alleged "[d]efendants, and each of them, have permitted and are now permitting the continuance and occurrence of said acts."

[2]In some instances, as appropriate, reference was made only to motion pictures, and in others only to magazines.

magazines are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters," and (c) that said "pictures and magazines are utterly without social value."

Each of the complaints attached and incorporated by reference exhibits which included police crime reports detailing the physical layout of each of the premises, copies of examples of magazines exhibited, and so-called time and motion studies of films.[3]

Each of the complaints further alleged (1) that the premises were being operated for profit (a matter explained in more detail in the exhibits which related the charges made for "browsing" among the magazines, for the purchase thereof, and for viewing the various motion picture films), and (2) that "unless restrained and enjoined therefrom, defendants, and each of them, will continue to maintain and conduct said premises for the purposes of

[3]These exhibits, erroneously referred to in the complaints as "time and studies of motion pictures," consist of verbal descriptions of the action depicted in the films keyed to strips of still prints of individual frames of the film corresponding thereto.

lewdness and will continue to permit such acts to take place therein and thereon." The remaining allegations of the complaints were essentially conclusory in nature; they consisted of statements concerning the law of California in respect of public nuisances in general and in particular the abatement of premises used for the purpose of lewdness.

The prayer in each of the complaints sought preliminary and permanent injunctive relief restraining defendants from conducting the premises as a public nuisance and from continuing the acts of "lewdness" (the exhibition of the obscene material) on the premises. The prayer further asked that the premises by [sic] abated in accordance with the provisions of sections 11230 and 11231 of the Penal Code by closure for one year, the sale of all fixtures, and application of the proceeds in accordance with such sections. Each prayer included, as well, the prayer "[t]hat plaintiff be granted such other and further relief, as to this court may seem fit and just."

In each instance the court, in sustaining the demurrer, indicated that it was bound to do so by the

holding of this court in Harmer v. Tonylyn Productions, Inc., 23 Cal.App.3d 941 [100 Cal.Rptr. 576], that the exhibition of a motion piture, however obscene, in a closed theatre (a) was not a public nuisance and (b) did not constitute a use of such theatre for the purpose of "lewdness, assignation, or prostitution" under the Red Light Abatement Law (Pen. Code, §11225 et seq.).

Defendants did not contend in the trial court, nor do they contend on this appeal, that the complaints did not adequately allege that the motion pictures and magazines being exhibited and sold at the five places of business described in the complaints were obscene. We may, therefore, spare the reader of this opinion any detailed description of them. Suffice it to say that if the allegations of the complaints as supplemented by the exhibits are true, the motion pictures and the magazines exhibited at defendants' places of business constitute hard-core pornography and are obscene when judged by the standard set forth in section 311 of the Penal Code, as that section has been interpreted by the appellate courts of this state. Though this standard may, by retaining the

"utterly without redeeming social importance" requirement, define obscenity more narrowly than it might have under Miller v. California (1973) 413 U.S. 15 [37 L.Ed.2d 419, 93 S.Ct. 2607], it is a valid definition of matter excluded from protection under the constitutional guarantees of freedom of speech. (People v. Enskat, 33 Cal.App.3d 900, 912 [109 Cal.Rptr. 433])

The question posed by this appeal is, therefore, rather narrow in scope; it is simply whether there is any relief which the plaintiffs may be awarded by the court on account of defendants' alleged conduct consisting of the operation of book stores exhibiting obscene magazines and viewing facilities exhibiting obscene motion pictures, which exhibition is continuously engaged in but visible only to those adults who voluntarily choose to see it and who have paid an admission price therefor.

Appellants advance two legal theories in support of their contention that the complaints do state causes of action. They are:

(1) The activities of defendants constitute public nuisances under the provision of sections 3479 and 3480 of

the Civil Code and section 370 of the Penal Code, which make a public nuisance "anything which . . . is indecent or offensive to the senses . . . so as to interfere with the confortable enjoyment of life or property" and which "affects at the same time an entire community or neighborhood, or any considerable number of persons."

(2) Defendants' places of business constitue nuisances under the probisions of section 11225 of the Penal Code, which in pertinent part provides: "Every building or place used for the purpose of . . . lewdness, assignation, or prostitution . . . is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance."

Appellants are obliged to fit the allegations of their complaints into some category of conduct declared by statute to be a public nuisance in view of the decision of our Supereme Court in People v. Lim, 18 Cal.2d 872 [118 P.2d 472]. In that case the court rejected the contention that a public nuisance should be defened "for the purposes of an injunction as any repeated and continuous violation of the law" (18 Cal.2d at p. 880) and imposed the

requirement that there be a legislative declaration "establishing those standards of public morality, the violations of which are to constitute public nuisances within equity's jurisdiction." (18 Cal.2d at p. 879.) The issues are, therefore, as follows:

Issues

1. Can the continuous exhibition in a book store, or theatre specializing in pornography, of obscene motion pictures and magazines constitute an activity which is "indecent or offensive to the senses . . . so as to interfere with the confortable enjoyment of life or property" and which "affects at the same time an entire community or neighborhood, or any considerable number of persons?"

2. Can the operation of book stores or theatres in such fashion constitute them "places used for the purpose of . . . lewdness, assignation, or prostitution?"

The Conduct of Defendants as Described in the Complaints Is a Public Nuisance

The argument by both sides with respect to the issue whether the defendants' conduct as described in the complaints comes within the provisions of sections 3479

and 3480 of the Civil Code and section 370 of the Penal Code defining a public nuisance is confined substantially to a discussion of two cases: Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941, and Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49 [37 L.Ed.2d 446, 93 S.Ct. 2628].

In Harmer this court affirmed on appeal a judgment of dismissal based upon a ruling sustaining a demurrer (without leave to amend) to a complaint seeking "an injunction to prevent the exhibition in a closed theater of a motion picture . . . and to abate it as a public nuisance." One of the bases upon which the appellant sought to support the complaint was the provisions of section 3479 and 3480 of the Civil Code defining public nuisance. The court found these sections inapplicable. Other than its quotation of section 3480, defining a public nuisance as "one which affects at the same time an entire community or neighborhood," the entire discussion of the public nuisance question comprised two short paragraphs as follows: "The film involved was shown only in a closed theatre. Only those persons could view it who had paid

the admission price and who had entered the theatre. Thus, only those members of the community were exposed to the film who voluntarily chose to see it. This is not a case where the community as a whole is forced to submit involuntarily to vile odors (Fisher v. Zumwalt, 128 Cal. 493 [61 P. 82]) or air pollution (Wade v. Campbell, 200 Cal. App. 2d 54 [19 Cal.Rptr. 173, 92 A.L.R.2d 966]) or to the unwelcome presence of animals (Hayden v. Tucker, 37 Mo. 214). In the statute's terms, the alleged nuisance at bench did not '. . . affect[s] at the same time an entire community or neighborhood, . . .' (Civ. Code, §3480) (italies added).

"At bench, only that portion of the public could see the film which voluntarily chose to enter the theatre. The nuisance was not one which is inflicted or imposed upon the public." (Harmer v. Tonylyn Productions, Inc., 23 Cal.App.3d at p. 934.)

The above discusion was an alternative ground for the court's decision inasmuch as it also found there were no allegations establishing the plaintiff's standing to bring the action as a private citizen. This does not detract

from its value as precedent. However, the opinion does not indicate whether the exhibition was part of a continuous or repeated course of conduct or merely an isolated incident, nor does it specify the basis of the court's conclusion that such exhibition did not "affect[ ] at the same time an entire community or neighborhood." Certainly Harmer does not stand for tne propostion that the continuous operation of theatres specializing in pornographic presentations (obscene motion pictures) could have no effect upon anyone except those persons who "voluntarily" chose to enter the theatre. If it did stand for any such proposition, we would be compelled respectfully to disagree with it.

The same subject is exhaustively discussed by the United States Supreme Court in Paris Adult Theatre I v. Slaton, supra, 413 U.S. 49 [37 L.Ed.2d 446]. In justifying the exclusion of an obscene motion picture from constitutional protection under the First Amendment, over the objection that it was "exhibited for consenting adults only," the Court said: "We categorically disapprove the theory, apparently adopted by the trial judge, that

obscene, pornographic films acquire constitutuional immunity from state regulation simply because they are exhibited for consenting adults only. This holding was properly rejected by the Georgia Supreme Court. Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults, see Miller v. California, ante, at 18-20; Stanley v. Georgia, supra, at 567; Redrup v. New York, 386 U.S. 767, 769 (1967), this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material. The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. See United States v. Thirty-seven Photographs, supra, at 376-377 (opinion of White, J.); United States v. Reidel, 402 U.S., at 354-356. Cf. United States v. Thirty-seven Photographs, supra, at 378 (Stewart, J., concurring). 'In an unbroken series of cases extending over a long stretch of this

Court's history, it has been accepted as a postulate that "the primary requirements of decency may be enforced against obscene publications." [Near v. Minnesota, 283 U.S. 697, 716 (1931)].' Kingsley Books, Inc. v. Brown, supra, at 440.

"In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby.[7] Rights and interests 'other than those of the advocates are involved.' Breard v. Alexandria, 341 U.S.

"[7] It is conceivable that an 'adult' theater can —if it really insists — prevent the exposure of its obscene wares to juveniles. An 'adult' bookstore, dealing in obscene books, magazines, and pictures, cannot realistically make this claim. The Hill-Link Minority Report of the Commission on Obscenity and Pornography emphasizes evidence (the Abelson National Survey of Youth and Adults) that, although most pornography may be bought by elders, 'the heavy users and most highly exposed people to pornography are adolescent females (among women) and adolescent and young adult males (among men).' The Report of the Commission on Obscenity and Pornography 401 (1970). The legitmate interest in preventing exposure of juveniles to obscene material cannot be fully served by simply barring juveniles from the immediate physical premises of 'adult' bookstores, when there is a flourishing 'outside business' in these materials.

622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime.[8] Quite apart from sex crimes, however, there remains one problem of large

"[8] The Report of the Commission on Obscenity and pornography 390-412 (1970) (Hill-Link Minority Report). For a discussion of earlier studies indicating 'a division of thought [among behavioral scientists] on the correlation between obscenity and socially deleterious behavior,' Memoirs v. Massachusetts,supra, at 451, and references to expert opinions that obscene material may induce crime and antisocial conduct, see id., at 451-453 (Clark, J., dissenting). As Mr. Justice Clark emphasized:

" 'While erotic stimulation caused by pornography may be legally insignificant in itself, there are medical experts who believe that such stimulation frequently manifests itself in criminal sexual behavior or other antisocial conduct. For example, Dr. George W. Henry of Cornell University has expressed the opinion that obscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic presentation of sexual behavior and attitudes, may induce antisocial conduct by the average person. A number of sociologists think that this material may have adverse effects upon individual mental health, with potentially disruptive consequences for the community.

"footnote forwarded"

proportions aptly described by Professor Bickel: " ' It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there .... We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places -- discreet, if you will, but accessible to all -- with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it

"footnote 8 continued"

" 'Congress and the legislatures of every State have enacted measures to restrict the distribution of erotic and pornographic material, justifying these controls by reference to evidence that antisocial behavior may result in part from reading obscenity.' Id., at 452-453 (footnotes omitted)."

or not.' 22 The Public Interest 25-26 (Winter 1971).[9] (Emphasis added.) As Mr. Chief Justice Warren stated, there is a 'right of the Nation and of the States to maintain a decent society . . . ,' Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (dissenting opinion).[10] See Memoirs v. Massachusetts, 383 U.S. 413, 457 (1966) (Harlan, J., dissenting); Beauharnais v. Illinois, 343 U.S. 250, 256-257 (1952); Kovacs v. Cooper, 336 U.S. 77, 86-88 (1949)."

The court then dealt with the argument that there is no scientific data demonstrating the validity of the views it had expressed. After adverting to various types of legislation based upon unprovable assumptions, the court

---

"[9] See also Berns, Pornography vs. Democracy: The Case for Censorship, in 22 The Public Interest 3 (Winter 1971); van de Haag, in Censorship: For & Against 156-157 (H. Hatt ed. 1971).

"[10] "'In this and other cases in this area of the law, which are coming to us in ever-increasing numbers, we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments.' Jocobellis v. Ohio, supra, at 199 (Warren, C. J., dissenting)." (Paris Adult Theatre I. v. Slaton, 413 U.S. at pp. 57-60 [37 L.Ed.2d at pp. 456-458])

concluded its discussion of the matter by statting: "If we accept the unprovable assumption that a complete education requires certain books, see Board of Education v. Allen, 392 U.S. 236, 245 (1968), and Johnson v. New York State Education Dept., 449 F.2d 871, 882-883 (CA2 1971) (dissenting opinion), vacated and remanded to consider mootness, 409 U.S. 75 (1972), id., at 76-77 (Marshall, J., concurring), and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? 'Many of these effects may be intangible and indistinct, but they are nonetheless real.' American Power & Light Co., supra, at 103. Mr. Justice Cardozo said that all laws in Western civilization are 'guided by a robust common sense . . . .' Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937). The sum of experience, including that of the

past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." (Paris Adult Theatre I v. Slaton, 413 U.S. at p. 63 [37 L.Ed.2d at p. 460].)

What is said by the Supreme Court in Paris Adult Theatre I is persuasive and establishes to the satisfaction of this court that the conduct of defendants described in the complaints with respect to the exhibition of obscene motion pictures is of a nature which, it could be found, "affects at the same time an entire community." The situation is even more clear with respect to the magazines exhibited and sold by defendants. As noted in footnote 7 of the material quoted from Paris Adult Theatre I, exposure to these magazines was not limited to consenting adults voluntarily entering defendants' book stores. Once

sold, there was no limit to the number of juveniles and nonconsenting adults who might be exposed to them.

Once the objection based on Harmer is disposed of, there is little question that the exhibiton of the obscene material described in the complaint constitutes a nuisance because it is "indecent or offensive to the senses" in the sense in which those terms are used in the nuisance statutes. Each of the complaints alleges that the motion pictures and magazines "are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters." Indeed, in order for them to be suppressed as obscene within the standard established by the United States Supreme Court in Miller v. California, supra, 413 U.S. 15 [37 L.Ed2d 419], it will have to be found that such matter "depicts or describes, in a patently offensive way, sexual conduct." (413 U.S. at p. 24 [37 L.Ed.2d at p. 431].)

The authorities demonstrating the propriety of treating obscene matter as a nuisance because it is "indecent or offensive to the senses" are collected in the dissenting opinion in Harmer (supra, 23 Cal.App.3d at pp.

946-948). They include Weis v. Superior Court, 30 Cal.App. 730 [159 P. 464], holding a demurrer was properly overruled to a complaint seeking to restrain a show described therein as an "entertainment designated and known as the 'Sultan's Harem,' which for an admission is open to the general public," employing women making "a public exhibition and exposure of their naked persons and private parts thereof to those attending . . . ." (30 Cal.App. at p. 731.) The acts complained of were held by the court to constitute a public nuisance; the court said: "While the acts here complained of clearly constitute a crime, they also constitute a nuisance within the meaning of section 3479 of the Civil Code, which defines a nuisance as 'Anything which is . . . indecent or offensive to the senses, . . . so as to interfere with the confortable enjoyment of life or property . . . .' And section 3480 of the same code defines a public nuisance as 'one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' Mr. Joyce in his work

on Nuisances (section 409) says: 'A disorderly and disreputable theatre may be enjoined, although a common nuisance.' To the same effect is Wood on Nuisances (section 68), where it is said: 'A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obsence pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious . . . and disorderly members of society.' . . . Not only as thus defined by text-writers and supported by decisions, but as declared in section 3479 of the Civil Code, any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance . . . ." (30 Cal. App. at pp. 732-733.)

Our determination that the allegations of the complaints suffice to bring the alleged activities of defendants within the definition of public nuisance in Penal Code

section 370 and Civil Code sections 3479 and 3480 establishes plaintiffs' standing under section 731[4] of the Code of Civil Procedure to bring a civil action to enjoin the public nuisance involved. "'An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case. . . .'" (Guttinger v. Calaveras Cement Co., 105 Cal.App.2d 382, 390 [233 P.2d 914].)

The propriety of injunctive relief preventing the exhibition or dissemination of obscene materials which are outside the constitutuional protections of free speech is recognized by the United States Supreme Court in Paris Adult Theatre I v. Slaton, supra. In that case the Georgia

[4]Secion 731 of the Code of Civil Procedure provides in part as follows: "A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officer shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city."

Supreme Court had held that the exhibition of the two films found to be obscene "should have been enjoined." Though the case was remanded for reconsideration in light of the new standards for determination of obscenity set forth in Miller v. California, supra, the United States Supreme Court expressly stated its approval of the Georgia procedure employed. The Court said in this respect: "This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutional acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the first amendment and subject to state regulation.[4] See Kingsley Books, Inc. v. Brown, 354 U.S.

"[4]This procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action, prior to any exposure to criminal penalty. We are not here presented with the problem of whether a holding that materials were not obscene could be circumvented in a later proceeding by evidence of pandering. See Memoirs v. Massachusetts, 383 U.S. 413, 458 n. 3 (1966) (Harlan, J., dissenting); Ginzburg v. United States, 383 U.S. 463, 496 (1966) (Harlan, J., dissenting).

436, 441-444 (1957). Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected.[5] Thus the standards of Blount v. Rizzi, 400 U.S. 410, 417 (1971): Teitel Film Corp. v. Cusack, 390 U.S. 139, 141-142 (1968); Freedman v. Maryland, 380 U.S.51, 58-59 (1965), and Kingsley Books, Inc. v. Brown, supra, at 443-445, were met. Cf. United States v. Thirty-seven Photographs, 402 U.S. 363, 367-369 (1971) (opinion of White, J.)."

There appears, therefore, no reason that similar relief might not be granted by the trial court based upon the five complaints in this case. The propriety of civil injunctions restraining the commission of criminal offenses which also constitute public nuisances has been recognized by our Supreme Court in People v. Lim, supra,

"[5] At the specific request of petitioners' counsel, the copies of the films produced for the trial court were placed in the 'administrative custody' of that court pending the outcome of this litigation." (Paris Adult Theatre I v. Slaton, 413 U.S. at p. 55 [37 L.Ed.2d at pp. 455-456].)

18 Cal.2d at p. 880, and the Supreme Court of the United States has upheld such procedure over the objection that it denies trial by jury. (Alexander v. Virginia (1973) 413 U.S. 836 [37 L.Ed.2d 993, 93 S.Ct. 2803].)

Since the complaints in each case stated facts on the basis of which some relief could be granted, the demurrers were improperly sustained, and the judgments must in each case be reversed.

It is unnecessary to discuss the many objections defendants urged to various forms of relief requested in the complaints on the public nuisance theory. Such questions are not legitimately posed by this appeal, which tests only the sufficiency of the complaints to state a cause of action for any relief, and it would be foolhardy for this court to attempt to write a procedural manual for the future conduct of these litigations.

We note, however, that the indecency and offense to the senses alleged in the complaints is limited to the exhibition of the obscene motion pictures and magazines. The nuisance, therefore, is confined to the content of the motion pictures and magazines. We are, accordingly,

dealing with the depiction and description of lewd conduct and not with lewd conduct, itself. Such being the case, the power of the court to grant relief, at all stages of the proceedings, will be governed by the limitations applicable to prior restraints upon alleged speech.

In Miller v. California, supra, 413 U.S. 15, 25-26 [37 L.Ed.2d 419, 431-432], the Court states: "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places.[8] At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic,

"[8] Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In United States v. O'Brien, 391 U.S. 367, 377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be 'sufficiently justified if . . . it furthers an important or substantial governmental interest; if the interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' See California v. LaRue, 409 U.S. 109, 117-118 (1972)." (Italics added.)

The clear import of this statement is that restrain upon dissemination of "depictions or descriptions" of lewd conduct must conform to the requirement that the "restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance" of the constitutionally permitted objective. The same limitation is articulated by our Supreme Court in the decision of Weaver v. Jordan, 64 Cal.2d 235 [49 Cal.Rptr. 537, 411 P.2d 289], which states at page 245 (quoting Shelton v. Tucker (1960) 364 U.S. 479, 488 [5 L.Ed.2d 231, 237, 81 S.Ct. 247]): " '[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' [Fn. omitted.]"

The trial court will also be obliged to take cognizance of the restrictions imposed by the principles stated in Freedman v. Maryland (1965) 380 U.S. 51 [13 L.Ed.2d 649, 85 S.Ct. 734], and the other decisions of the United States Supreme Court circumscribing the trial court's power to

injunctions pendente lite.[5]

The Red Light Abatement Law Has No Significant Bearing Upon These Litigations

Of the seven sections of the Penal Code (§§ 11225-11231) which comprise the Red Light Abatement Law, only one is a substantive law provision. Section 11225 makes nuisances of buildings or places used for the purpose of illegal gambling, lewdness, assignation or prostitution. The remaining sections deal with the relief appropriate for the abatement of such nuisances.

Insofar as section 11225 might contribute to the determination that the complaints in these actions allege the existence of a nuisance, it would add nothing to the resolution of any issue posed by this appeal. We have already held that the allegations of the complaints are sufficient to invoke the provision of the general nuisance law as set forth in sections 3479 and 3480 of the Civil

[5]These cases are collected in the opinion of Paris Adult Theatre I v. Slaton, supra, 413 U.S. at p.55 [37 L.Ed.2d at pp. 455-456], where it is indicated that these "standards" are applicable to injunctive proceedings to restrain the exhibition of films on the basis of their obscenity.

Code and section 370 of the Penal Code. We, therefore, find it unnecessary to prolong this opinion by discussing the highly debatable claim on the part of plaintiffs that defendants' places of business are used for "lewdness" or "prostitution" within the meaning of section 11225 of the Penal Code. We are also persuaded that even if we were to agree with plaintiffs that defendants' various places of business are nuisances within the provisions of section 11225, the scope of the relief which might be granted would not thereby be enlarged. The complaints do not allege that any "lewdness" is occuring at defendants' various places of business other than the exhibition of the obscene motion pictures and magazines. Any nuisance alleged relates solely to the content of "depictions or descriptions" of lewd behavior. As we have already noted, prior restraint upon the exhibition of such depictions or descriptions may only be imposed in accordance with standards applicable to the suppression of alleged First Amendment freedoms.

Disposition

The judgments, and each of them, are reversed and

remanded for further proceedings in accordance with this opinion.

Ford, P.J., and Allport, J., concurred.

APPENDIX E

(Facsimile)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Date: June 18, 1973 Dept. 11

Honorable Charles S. Vogel, Judge

K. Ghezzi, Deputy Clerk

D. Grace, Reporter

C 56568

Joseph P. Busch, etc, et al
vs
The Projection Room Theatre etc, et al

Counsel for Plaintiff: Joseph P. Busch, District Atty
Roger Arneberg, City Atty
by: E. Hogman, Deputy & R. Byrne, Deputy

Counsel for Defendant: Fleishman, McDaniel, Brown & Weston for demurring defendants

---

NATURE OF PROCEEDINGS.
(cont. 1st disp)

Demurrer of defendants
The Projection Room Theatre, Charlotte Reed, Natalie Robin, Willard C. Oppenheim, Howrd C. Wirick Jr. and Mark Wirick to Complaint

Demurrer sustained without leave to amend.

Auto Equity Sales, Inc. v. Superior Court, 57 C2d 450 at 455, compels this Court to follow the holding in Harmer v. Tonylyn Productions, Inc., 23 CA3d 941.

People ex rel Hicks v. Sarong Gals, 27 CA3d 46 at 50, cites Harmer by stating that its "...dictum" declares Penal Code 11225, et seq. applies to a live, lewd stage show. This case (Sarong Gals) only "questions" Harmer's declaration that the law cannot apply to motion pictures.

There is no case that this Court can find that applies Penal Code Sec. 11225 to obscene films or pictures. Therefore, this Court is compelled to sustain the demurrer without leave to amend.

The plaintiffs having failed to attach the exhibits referred to in the Complaint, the Court invited a stipulation that all of the exhibits filed in support of the preliminary injunction are deemed to be annexed to the complaint and to be the exhibits referred to in the complaint. All parties orally accepted the Court's stipulation, and the stipulation was orally entered on the record.

Order of Dismissal prepared pursuant to CCP 581(3).

Counsel to give notice.

(Facsimile)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Date: June 18, 1973 Dept. 11

Honorable Charles S. Vogel, Judge

K. Ghezzi, Deputy Clerk

D. Grace, Reporter

C 56569

Joseph P. Busch, etc, et al
vs
Stan's Books, etc, et al

Counsel for Plaintiff: Joseph P. Busch, District Atty
Roger arneberg, City Atty
by: R. Byrne, Deputy & E. Hogman, Deputy

Counsel for Defendant: Fleishman, McDaniel, Brown & Weston for demurring defendants

---

NATURE OF PROCEEDINGS.
(cont. 1st disp)

Demurrer of defendants
Stan's Books, Sam Rabin, Morris Rosen, Pacific Southwest Realty, B & I News, Inc. Sterling J. Coley, Robert Maimer and Alfred Rodney to Complaint

Demurrer sustained without leave to amend.

Auto Equity Sales, Inc. v. Superior Court, 57 C2d 450 at 455, compels this Court to follow the holding in Harmer v. Tonylyn Productions, Inc., 23 CA3d 941.

People ex rel Hicks v. Sarong Gals, 27 CA3d 46 at 50, cites Harmer by stating that its "... dictum" declares Penal Code 11225, et seq. applies to a live, lewd stage show. This case (Sarong Gals) only "questions" Harmer's declaration that the law cannot apply to motion pictures.

There is no case that this Court can find that applies Penal Code Sec. 11225 to obscene films or pictures. Therefore, the Court is compelled to sustain the demurrer without leave to amend.

The plaintiffs having failed to attach the exhibits referred to in the Complaint, the Court invited a stipulation that all of the exhibits filed in support of the preliminary injunction are deemed to be annexed to the complaint and to be the exhibits referred to in the complaint. All parties orally accepted the Court's stipulation, and the stipulation was orally entered on the record.

Order of Dismissal prepared pursuant to CCP 581(3).

Counsel to give notice.

(Facsimile)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Date: June 18, 1973 Dept. 11

Honorable Charles S. Vogel, Judge

K. Ghezzi, Deputy Clerk

D. Grace, Reporter

C 56570

Joseph P. Busch, etc, et al
vs
Book Bin, et al

Counsel for Plaintiff: Joseph P. Busch, District Atty
Roger Arneberg, City Atty
by: R. Byrne, Deputy & E.Hogman, Deputy

Counsel for Defendant: Fleishman, McDaniel, Brown & Weston for demurring defendants

---

NATURE OF PROCEEDINGS.
(cont. 1st disp)

Demurrer of defendants
Book Bin, Joseph Ingber, Daniel J. Apple, Movie Natic Incorporated, Michael Thevis, Roger Underhill, Joan Thevis, Noel C. Bloom, Phillip Alan Fishman, Peter Lewis and Sherry Bloom to Complaint

Demurrer sustained without leave to amend.

Auto Equity Sales, Inc. v. Superior Court, 57 C2d 450 at 455, compels this Court to follow the holding in Harmer v. Tonylyn Productions, Inc., 23 CA3d 941.

People ex rel Hicks v. Sarong Gals, 27 CA3d 46 at 50, cites Harmer by stating that its ". . . dictum" declares Penal Code 11225, et seq, applies to a live, lewd stage show. This case (Sarong Gals) only "questions" Harmer's declaration that the law cannot apply to motion pictures.

There is no case that this Court can find that applies Penal Code Sec 11225 to obscene films or pictures. Therefore, the Court is compelled to sustain the demurrer without leave to amend.

The plaintiffs having failed to attach the exhibits referred to in the Complaint, the Court invited a stipulation that all of the exhibits filed in support of the preliminary injunction are deemed to be annexed to the complaint and to be the exhibits referred to in the complait. All parties orally accepted the Court's stipulation, and the stipulation was orally entered on the record.

Order of Dismissal prepared pursuant to CCP 581(3).

Counsel to give notice.

(Facsimile)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Date: June 18, 1973 Dept. 17

Honorable Charles S. Vogel, Judge

K. Ghezzi, Deputy Clerk

D. Grace, Reporter

C 56571

Joseph P. Busch, etc, et al
vs
Galazy Book Store, et al

Counsel for Plaintiff: Joseph P. Busch, District Atty
Roger Arneberg, City Atty
By: R. Byrne, Deputy & E. Hogman, Deputy

Counsel for Defendant: Fleishman, McDaniel, Brown & Weston for demurring defendants

---

NATURE OF PROCEEDINGS.
(cont. lst disp)

Demurrer of defendants
Galazy Book Store, Ahmed Bey, Acme Conveyance Corporation, Margaret Steiner and Richard Nathan to Complaint

Demurrer sustained without leave to amend.

Auto Equity Sales, Inc. v. Superior Court, 57 C2d 450 at 455, compels this Court to follow the holding in Harmer v. Tonylyn Productions, Inc., 23 CA3d 941.

People ex rel Hicks v. Sarong Gals, 27 CA3d 46 at 50, cites Harmer by stating that its "... dictum" declares Penal Code 11225, et seq. applies to a live, lewd stage show. This case (Sarong Gals) only "questions" Harmer's declaration that the law cannot apply to motion pictures.

There is no case that this Court can find that applies Penal Code Sec. 11225 to obscene films or pictures. Therefore, the Court is compelled to sustain the demurrer without leave to amend.

The plaintiffs having failed to attach the exhibits referred to in the Complaint, the Court invited a stipulation that all of the exhibits filed in support of the preliminary injunction are deemed to be annexed to the complaint and to be the exhibits referred to in the complaint. All parties orally accepted the Court's stipulation, and the stipulation was orally entered on the record.

Order of Dismissal prepared pursuant to CCP 581(3).

Counsel to give notice.

(Facsimile)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Date: June 28, 1973 Dept. 21

Honorable Charles S. Vogel, Judge

K. Ghezzi, Deputy Clerk

C 56572

Joseph P. Busch, etc et al
vs
Jasons Adult Books, etc, et al

Counsel for Plaintiff: Roger Arnebergh, City Attorney
by

Counsel for Defendant: Harrison W. Hertzberg for
demurring defts
by: J. Kaplan

NATURE OF PROCEEDINGS.
(uncont. 1st disp o/deft)

Demurrer of defendants
Jason's Adult Books, Kaufman Investment Corp,
Lew Kaufman, Violet Kaufman and Sturat D. Parr
to plaintiff's Complaint

Demurrer sustained without leave to amend, pursuant to Paragraph 1 of the demurrer (CCP 430.10(F)).

Harmer v. Tonylyn Productions, Inc., 23 CA3d 941, 943.

Order of Dismissal prepared pursuant to CCP 581(3).

Counsel to give notice.

APPENDIX F

(Facsimile)

L. A. No. 30432 to 30436

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE EX REL., BUSCH, ETC., ET AL.,

v.

PROJECTION ROOM THEATER ET AL

AND FOUR OTHER CASES.

The opinions filed herein on March 4, 1976 in the above entitled proceedings are ordered vacated. The opinions as set forth in the attachment hereto are ordered filed in lieu thereof.

(Supreme Court - Filed - Jun 1, 1976 - G.E. Bishel, Clerk)

(Wright)
Chief Justice

APPENDIX G

(Facsimile)

L. A. No. 30432 to 30436 (Inclusive)

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

PEOPLE EX REL.,
BUSCH, AS DISTRICT ATTORNEY, ETC., et al

v.

PROJECTION ROOM THEATER ET AL.

(and four other cases)

Appellant's petition for "reconsideration and modification of opinion" is denied.

Tobriner, J., is of the opinion that the petition should be granted.

(Supreme Court - Filed - Jul 15, 1976 - G.E. Bishel, Clerk)

(Wright)
Chief Justice

APPENDIX H

(Facsimile)

L.A. No. 30432 to 30436 (Inclusive)

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE ex rel., JOSEPH P BUSCH, As District Attorney, etc., et al.

v.

PROJECTION ROOM THEATER, et al.,

(and 4 other cases)

"Motion to recall remittitur or stay proceedings in trial court" is demied.

(Supreme Court - Filed - Aug 12, 1976 - G.E. Bishel, Clerk)

(Sullivan)
Acting Chief Justice

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-340

THE PEOPLE EX REL. JOHN K. VAN DE KAMP, as District Attorney, etc., *et al.*,

Petitioners,

vs.

PROJECTION ROOM THEATER, *et al.*,

Respondents.

(and four other cases)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DAVID M. BROWN,
FLEISHMAN, BROWN, WESTON & ROHDE,
A Professional Corporation,
433 North Camden Drive, Suite 900,
Beverly Hills, Calif. 90210,
Attorneys for Respondents.

STANLEY FLEISHMAN,
JOHN H. WESTON,
SAM ROSENWEIN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-340

THE PEOPLE EX REL. JOHN K. VAN DE KAMP, as District Attorney, etc., *et al.*,

Petitioners,

vs.

PROJECTION ROOM THEATER, *et al.*,

Respondents.

(and four other cases)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The Opinion of the California Supreme Court is reported at 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976).

Jurisdiction.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(3). Respondents contend that this Court lacks jurisdiction to issue a Writ of Certiorari herein because the June 1, 1976 decision of the California Supreme Court is not a "final judgment or decree" within the meaning of 28 U.S.C. §1257 and the interpretive decisions of this Court. Respondents will address themselves to the finality issue in detail hereafter.

Questions Presented.

1. Whether the June 1, 1976 decision of the California Supreme Court, reversing trial court judgments sustaining demurrers to Petitioners' Complaints, and remanding the cases for trial, constitutes a "final judgment or decree," within the meaning of 28 U.S.C. §1257.

2. Whether Petitioners have failed to raise a substantial federal question because the decision of the California Supreme Court is manifestly correct and consistent with this Court's decisions in *Art Theater Guild, Inc., et al. v. Ewing*, 421 U.S. 923, and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, fn. 23 and accompanying text.

Statement of the Case.

Petitioners, law enforcement officials of the City and County of Los Angeles, filed separate complaints against five (5) bookstores and motion picture theaters in the City of Los Angeles. Each of the complaints is essentially identical and alleges that the theaters and bookstores constitute public nuisances under both the general public nuisance statutes (California C.C. §3479, 3480, 3491; California P.C. §370) and under the specific provisions of the state Red Light Abatement Law (P.C. §11225 *et seq.*). The nuisance complained of is said to be "past and continuing exhibition" of magazines and films "all of which are lewd and obscene" under the laws of the state. The complaints seek preliminary and permanent injunctive relief, including specific forms of injunctive relief and forfeitures as provided for in the state Red Light Abatement Law, but not the general public nuisance statutes; to wit, closure of the premises for one (1) year, removal and sale of the fixtures and movable property

thereon used in conducting the alleged nuisance, and use of the proceeds from the sale to pay fees and costs in connection with the closure.

The trial court sustained Respondents' demurrers to the complaints without leave to amend and entered judgments of dismissal, ruling that Petitioners failed to state a cause of action either under the public nuisance statutes or the Red Light Abatement Law.

Petitioners appealed, and the California Supreme Court reversed the trial court's judgments of dismissal and remanded the cases for further proceedings consistent with the state Supreme Court's opinion. With respect to the Red Light Abatement Law, the court below agreed with the trial court and held, as a matter of legislative interpretation, that the Red Light Abatement Law was not intended to apply to the exhibition of obscene magazines or films. The ruling of the court below rejecting the applicability of the Red Light Abatement Law rests upon an adequate and independent state ground and is not subject to review. As noted, it is only the Red Light Abatement Law that provides for specific forms of relief including closure of the premises to any purpose for one (1) year.

With respect to the state's general public nuisance statutes, however, the court below disagreed with the trial court and held that Petitioners' complaints did state a cause of action upon which some relief could be granted by the trial court if the allegations of the complaints were proved. Because these cases came to the state Supreme Court following the trial court's sustaining of general demurrers, the Supreme Court's review was "considerably narrowed by application of the familiar rule" that " 'a general demurrer admits the truth of all material factual allegations in the com-

plaint' ", and the court below accordingly assumed that all magazines and films sold or exhibited at the premises in question were obscene within the meaning of the state obscenity statute, California P.C. §311. (130 Cal.Rptr. at 331).

After holding that Petitioners' complaints state causes of action under the state's general public nuisance statutes, the court below reviewed the possible forms of relief available to Plaintiffs in such actions. The court below concluded that:

> "The public nuisance statutes, unlike the Red Light Abatement law, do not provide for such specific forms of relief as temporary and perpetual injunction (P.C. §§11226-11227), removal and sale of fixtures, and closure of the premises for one (1) year (P.C. §11230). Instead, the District Attorney or City Attorney is, in general terms, empowered to being a civil action to 'abate' the public nuisance. (C.C.P. §731.) Further, ' "An abatement of a nuisance is accomplished in a court of equity by means of an injunction *proper and suitable* to the facts of each case. . . ." ' (italics added; Guttinger v. Calaveras Cement Co. (1951) 105 C.A.2d 382, (390) [233 P.2d 914]; see generally, McQuillin, Municipal Corporations, §24.73.)" (130 Cal.Rptr. at 337).

The court below then stated that if the trial court should find any of the materials to be obscene, after an adversary hearing on the merits, an injunctive order "proper and suitable" could be fashioned. The state Supreme Court added that under the general

public nuisance statutes, considered in the light of constitutional considerations respecting prior restraints of communication, a proper and suitable injunctive order would be one enjoining the exhibition and sale of the specific materials adjudged obscene after an adversary hearing, but not an order padlocking the bookstores or theaters themselves, or enjoining the exhibition or sale of materials not specifically so determined to be obscene. (130 Cal.Rptr. at 337-338).

The court below emphasized that the proceedings. "remain at the pleading stage" and that "Having determined that [Petitioners'] complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise dimensions of the injunctive and other relief which might be suitable in this and the related cases." (130 Cal.Rptr. at 339).

REASONS FOR DENYING THE WRIT.

1. The decision of the court below plainly lacks the requisite finality to satisfy the jurisdictional requirements of 28 U.S.C. §1257. The court below merely reversed the sustaining of general demurrers to the complaints without leave to amend, and remanded to the trial court for further proceedings, including trial. In this posture of the case, no books, magazines or films have been determined obscene after an adversary hearing on the merits, much less has there been any determination on the merits that respondents "continuously" sell and exhibit books, magazines and films "all of which are lewd and obscene". If Petitioners proceed to trial, and prove the allegations of their complaints, it remains for the trial court to fashion an equitable decree "proper and suitable to the facts of each case." As noted earlier, the state's general public nuisance statutes do not specify any particular forms of relief to which Petitioners would be entitled. Should Petitioners prevail at trial and be granted less relief than they believe themselves entitled to, they concededly have a right to appellate review wherein they may preserve their federal questions. Moreover, if any relief is granted Petitioners at the trial, it is inevitable that additional constitutional questions will be raised on appeal by Respondents, including but not limited to the obscenity *vel non* of some or all of the materials involved in these cases.

The decision of the court below, accordingly, is a classic example of a decision lacking the finality required to confer jurisdiction upon this court. A judgment or decree that is final within the meaning of 28 U.S.C. §1257 "must be subject to no further review or correction in any other state tribunal; it must also

be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551. This Court has, of course, encountered several categories of cases in which a state court judgment has been deemed final notwithstanding that further proceedings in the lower state courts were to come. These categories of cases recently were analyzed by the Court in *Cox Broadcasting Corp. v. Cohn*, ... U.S. ....., 95 S.Ct. 1029, 1037-1042. The present case bears none of the characteristics of any of the categories of cases outlined in *Cox* in which finality was found even though further state court proceedings were contemplated.

Thus, in most of the cases discussed in *Cox*, the additional state court proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, unlike the present case. See, 95 S.Ct. at 1037. In two categories of the aforesaid cases, the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain or they are wholly unrelated to the federal question. See, 95 S.Ct. at 1038-1039; see, *e.g.*, *Mills v. Alabama*, 384 U.S. 214; *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120.

The third category outlined in *Cox* involves situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. In these cases, "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits,

however, the governing state law would not permit him again to present his federal claims for review." 95 S.Ct. at 1039; see, *e.g., California v. Stewart,* 384 U.S. 436; *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156. The present case has nothing in common with the latter category, since Petitioners are entitled to appeal from a judgment after trial, and to preserve their federal questions, regardless of whether they lose on the merits, or prevail on the merits but are not granted all the relief to which they consider themselves entitled.

Finally, this case is wholly unlike the final category of cases analyzed in *Cox*. In those cases, the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review in this Court might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. Cases presenting such circumstances have been accepted for review if a further condition is satisfied, namely, that a refusal immediately to review the state court decision might seriously erode a federal policy. See, 95 S.Ct. at 1040-1041; see, *e.g., Local No. 438 v. Curry,* 371 U.S. 542; *Mercantile National Bank v. Langdeau,* 371 U.S. 555; *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S.Ct. 2831; *Hudson Distributors v. Eli Lilly,* 374 U.S. 386. Unlike those cases, Petitioner here cannot prevail at trial on nonfederal grounds, nor could this Court's reversal of the decision of the

court below at this stage of the proceedings preclude further litigation on the merits in the state courts. Moreover, this is hardly a case in which this Court's refusal immediately to review the state court decision might seriously erode a federal policy. For what is here at stake is not, as Petitioners claim, the ability of a state to enforce its policy against the commercial dissemination of obscenity, but rather whether this Court will give its blessing to particular forms of broad injunctive relief against obscenity which never have achieved even the slightest indication of approval in any of this Court's prior decisions, and which state courts throughout the nation uniformly have condemned.[1]

2. Petitioners' contentions on the merits fail to raise a substantial federal question warranting the grant of a writ of certiorari. Petitioners argue that the First and Fourteenth Amendments are not offended by injunctive orders padlocking theaters and bookstores for a year following a finding of their past sale and exhibition of obscene materials. They argue that such padlock orders are not forbidden prior restraints on freedom of speech and press. Petitioners additionally contend that there is no constitutional impediment to perpetual injunctions enjoining persons from disseminating any obscene matter in the future, following a finding that they have disseminated particular materials determined to be obscene. These sledgehammer forms of injunctive relief never have received approval from this Court,

---

[1]This case is most emphatically unlike *Cox* itself, in which "the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt. . . ." 95 S.Ct. at 1041-1042.

but rather have been condemned as impermissible prior restraints of expression. See, *Near v. Minnesota,* 283 U.S. 697; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Freedman v. Maryland,* 380 U.S. 51; *Organization for a Better Austin v. Keefe,* 402 U.S. 415; compare *Kingsley Books, Inc. v. Brown,* 354 U.S. 436.

Petitioners place their principal reliance upon this Court's decision in *Art Theater Guild, Inc. v. Ewing,* 421 U.S. 923, in which this Court dismissed for want of a substantial federal question an appeal from the Ohio Supreme Court's decision in *State ex rel Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Ohio, 1974). But this Court's treatment of the "Without a Stitch" decision not only fails to support Petitioners' arguments, but on the contrary clearly establishs the correctness of the California Supreme Court's opinion below.

The "*Without a Stitch*" decision involved an Ohio nuisance statute which, on its face, authorized a one-year padlock order for premises found to have disseminated obscene materials. But the Ohio Supreme Court in "*Without a Stitch*" narrowly construed the statute so that, in substance and effect, it authorizes injunctive relief no broader than that authorized by the California Supreme Court herein. That is to say, following a finding that a theater exhibited an obscene film, the Ohio statute as narrowed provides for a padlock order, but such order may be vacated immediately upon the property owner's appearance, payment of costs, and posting a bond conditioned upon the owner's ability to prevent the recurrence of the nuisance. The nuisance, however, is simply the exhibition of the particular film found obscene. Thus, the Ohio statute as construed in "*Without a Stitch*" is the substantial equivalent of the nuisance proceedings and relief author-

ized by the court below, to wit, a permanent injunction under the public nuisance statutes against particular materials adjudged obscene after an adversary hearing.

Respondents' reading of the "*Without a Stitch*" opinion is fortified by this Court's discussion of that case in *Huffman v. Pursue, Ltd.*, 420 U.S. 529, fn. 23 and accompanying text. In *Huffman,* this Court characterized the "*Without a Stitch*" case as having "narrowly construed the Ohio nuisance statute, with a view to avoiding the constitutional difficulties which concerned the District Court." In Footnote 23, this Court explained that:

> "In '*Without a Stitch*' it was decided that the closure provisions of Ohio Rev.Code Ann. §3767.06 were applicable even if a theatre had shown only one film which was adjudged to be obscene. However, *the Ohio Supreme Court was concerned with the constitutional implications of prior restraint of films which had not been so adjudged.* In narrowing the statute the court noted that §3767.04 specifies conditions under which a release may be obtained from the closure order: the property owner must appear in court, pay the cost incurred in the action, file a bond in the full value of the property, and demonstrate to the court that he will prevent the nuisance from being reestablished. The Court then made this *critical clarification:*
>
> " '*The nuisance is the exhibition of the particular film declared obscene.* The release provisions do not, as appellants contend, require the owner to show that no film to be exhibited during the one-year period will be obscene. Such a requirement would not only be impossible, as a practical

> matter, but also would be an unconstitutional prior restraint. . . .' 37 Ohio St.2d, at 105, 307 N.E.2d, at 918." (420 U.S. 529, fn. 23) (Emphasis added).

Plainly, Petitioners' claim that broad padlock orders and injunctions against the dissemination of materials not yet adjudged obscene are remedies which satisfy the First and Fourteenth Amendments finds no support in this Court's treatment of the "*Without a Stitch*" opinion, nor in any other decision of this Court.

Finally, it should be noted that the overwhelming weight of authority throughout the nation condemns as unconstitutional prior restraints, the forms of relief sought by Petitioners herein. See, *General Corporation v. State ex rel Sweeton,* 320 So.2d 668, 675 (Ala. 1975); *State of Kansas v. A Motion Picture Entitled "The Bet",* 547 P.2d 760 (Kan. 1976); *Gulf States Theaters of Louisiana, Inc. v. Richardson,* 287 So.2d 480, 489 (La. 1973); *Mitchum v. State ex rel Schaub,* 250 So.2d 883, 886-887 (Fla. 1971); *New Riviera Arts Theater v. State,* 412 S.W.2d 890, 893-895 (Tenn. 1967); *Sanders v. State,* 203 S.E.2d 153, 156-157 (Ga. 1974); *State ex rel Little Beaver Theater, Inc. v. Tobin,* 258 So.2d 30, 32 (Fla. App. 1972); *State ex rel Ewing v. "Without a Stitch", supra.*

In the light of all the decisions of this Court previously cited, and the decisions of the state courts throughout the nation, it is manifest that Petitioners have failed to raise a substantial federal question.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID M. BROWN,
FLEISHMAN, BROWN, WESTON & ROHDE,
A Professional Corporation,
Attorneys for Respondents.

STANLEY FLEISHMAN,
JOHN H. WESTON,
SAM ROSENWEIN,
Of Counsel.